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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

FROM DECEMBER, 1859, TO FEBRUARY, 1861.

BY ABRAM D. SMITH.

VOLUME X.

MADISON, WIS.:
ATWOOD, RUBLEE & REED, BOOK AND JOB PRINTERS.
1861.

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Entered according to Act of Congress, in the year of our Lord one thousand eight hundred and sixty-one,

BY ABRAM D. SMITH,

In the District Court of the United States for the District of Wisconsin.

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OFFICERS OF THE SUPREME COURT.

HON. LUTHER S. DIXON, *Chief Justice.*

HON. ORSAMUS COLE, } *Associate Justices.*
HON. BYRON PAINE, }

HON. GABRIEL BOUCK, *Attorney General,* 1859.

HON. JAS. H. HOWE, " " 1860.

LA FAYETTE KELLOGG, Esq., *Clerk.*

HON. ABRAM D. SMITH, *Reporter.*

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LIST OF ATTORNEYS

Admitted During the Time of these Decisions,

1860.

Names.	*Residence.*	*Date of Admission.*
HENRY S. LEE,	Milwaukee,	*January* 10.
S. D. CARPENTER,	Madison,	*January* 10.
A. SCOTT SLOAN,	Beaverdam,	*January* 10.
GEORGE B. GOODWIN,	Menasha,	*January* 10.
A. G. EASTLAND,	Richland Centre,	*January* 14.
P. L. SPOONER,	Madison.	*January* 25.
J. B. TURCK,	Milwaukee,	*February* 8.
ISRAEL HOLMES,	Portage,	*February* 8.
HARVEY BRIGGS,	Briggsville,	*February* 8.
WILLIAM PITT BERTTEN,	Eauclaire,	*February* 8.
CHARLES C. COTTON,	Milwaukee,	*February* 17.
CHARLES CAVERNO,	Milwaukee,	*February* 21.
RICHARD LINDSAY,	Lodi,	*February* 23.
CHRALES T. CLOTHIER,	Jefferson,	*February* 23.
W. L. SMITH,	Madison,	*February* 23.
EDWIN E. BRYANT,	Monroe,	*February* 28.
MARCUS D. LARROWE,	Princeton,	*February* 28.
EDWARD M. MCFETRIGDGE,	Beaverdam,	*February* 29.
HALBERT E. PAINE,	Milwaukee,	*February* 29.
E. W. CARPENTER,	Milwaukee,	*February* 29.
J. D. MARKHAM,	Manitowoc,	*February* 29.
MARTIN FIELD,	Mukwanago,	*February* 29.
W. H. MITCHELL,	Wautoma,	*February* 29.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN.

BATEMAN *vs.* JOHNSON, et al.

APPEAL FROM CIRCUIT COURT, GREEN COUNTY.

Heard October 20, 1859.] [Decided December 14, 1859.

Conveyances—Specific Performance—Demurrer—Practice.

In an action for a breach of a contract to convey real estate, it is a good answer, that a good and sufficient deed of the premises has been executed by the party in whom the legal title to the premises was, and tendered to the plaintiff and he refused to receive it.

If an answer is indefinite and uncertain, the remedy under the code is by motion to make it more certain, and not by demurrer.

The case of *Young vs. Wright*, 4 Wis., 144; S. C., 6 id., 127, considered and approved.

This was an action brought by William C. Bateman in the circuit court for Green county, Wisconsin, to recover the purchase money paid by the plaintiff to Corbly Johnson and Miron C. Burnett, the defendants, on a bond to convey certain real estate situated in said county, together with damages on the bond by the defendants in refusing to convey the land described in the bond. The action was commenced by the personal service of a summons and complaint on the defendants therein.

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The defendants answered, denying generally all the allegations of the complaint; and Johnson further answered, that "he tendered to the plaintiff a good and sufficient deed of the premises in the complaint described, which deed was made and executed by the parties in whom the legal title to the premises then was, which deed the plaintiff refused to receive.

To this answer of Johnson the plaintiff demurred, which demurrer was overruled by the circuit court, and an appeal is taken thereon to this court.

Potter & O'Brien, for the appellant, with whom was *H. Stevens*, as counsel.

E. A. West, for the respondents.

By the Court, Cole, J. This was an action brought upon a contract for the sale and conveyance of real estate. The complaint contains the agreement sued on, from which it appears that the respondents agreed with the appellant to make, execute and deliver to him "a good and sufficient deed of conveyance," of a tract of land therein described, within one month from the date of the instrument. The respondent, Johnson, put in an answer denying every allegation of the complaint; and further answered, that before the commencement of the suit, and on or about the 21st day of October, &c., he tendered to the appellant a good and sufficient deed of the premises described in the complaint, which deed was executed by the parties in whom the legal title to the premises then was, and which deed the appellant refused to receive. To this answer the appellant demurred, on the ground that the facts stated in the answer did not constitute any defense to the action. The demurrer was overruled, and from the order overruling the same, this appeal is taken.

We are of the opinion that the circuit court properly overruled the demurrer. It is objected that the answer should set forth the nature and kind of conveyance tendered, and that the averment that "a good and sufficient deed" was tendered,

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does not enable the court to determine whether the contract has been fulfilled or not. If the allegations of the answer were so indefinite or uncertain that the precise nature of the defense was not apparent, the proper remedy under the code would be by a motion to require the answer to be made more definite and certain. Section 66, Code; R. R., 1859, chap. 125, § 22. But we also think that the answer does state, with sufficient legal certainty, the nature of the conveyance tendered.

Under the decisions of this court, an agreement to execute a good and sufficient deed of real estate, implies a conveyance not only good in point of form, but one which carries with it a good and sufficient title to the land. *Young vs. Wright*, 4 Wis., 144; same case, 6 id., 127. A performance of the contract would render it necessary that the respondents should tender a deed conveying the entire estate in the land sold; and that such a deed was tendered, the allegation in the answer implies.

It is further objected to the answer, that it states the deed was made by the parties in whom the legal title then was, while by the contract it is insisted the respondents agreed to give a conveyance of their title in the lands. By the contract the appellant was entitled to a deed conveying to him the entire estate. If the respondents were not seized of such an estate it was their duty to procure a conveyance from the party who was so seized. This is what they had contracted to do.

We do not deem it necessary to add anything further in this case. The order of the circuit court is affirmed.

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BLADE et al. *vs.* CHICAGO, ST. PAUL, & FOND DU LAC RAILROAD CO.

APPEAL FROM CIRCUIT COURT, ROCK COUNTY.

Heard October 14, 1859.] Decided December 14, 1859.]

Common Carriers—Evidence.

Where a railroad company, as common carriers, have received goods, and given a receipt for them, which states that they were received in "apparent good order," it is competent for the company to show, by parol testimony, that the goods most probably had been injured before they came into the possession of the company.

This is an action brought by the plaintiffs, Aaron Blade and Charles C. Shoyer, against the defendants, The Chicago, St. Paul, and Fond du Lac Railroad Company, as common carriers, in the circuit court for Rock county, to recover damages for injuries done to six bales of domestic goods, delivered to the defendants at Chicago, and by the defendants for good and legal consideration to be freighted over the road of the defendants, and to be delivered to the plaintiffs, at Janesville, Wisconsin.

The facts of the evidence given in the case are, sufficiently stated in the opinion of the court. The case was tried by the circuit judge, and judgment given for the defendant; from which the plaintiffs appealed to this court.

G. W. Cumming, for the appellants, made the following among other points:

1. Common carriers are liable for all losses or injuries, except such as are ocasioned by the act of God, or public enemies.

In all cases when the common carrier cannot make out a defense upon some one of the grounds which form an exception to his liability, he must pay the loss, although there has been no negligence whatever upon his part.

The *onus probandi* is on the common carrier to exempt himself from liability, for the law imposes the obligation of safety upon him. Story on Bailments, § 529.

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2. No defense recognized by the law was shown by the defendants.

All the proof given by the defendants, was inadmissible under the pleadings, and constituted no defense. *McArthur vs Sears*, 21 Wen. Rep. 190, and cases there cited; Story on Bailments, § 492, 507, 528.

3. The judge erred in receiving the defendant's proof when objected to by the plaintiffs, and the exceptions thereto were well taken.

David Noggle, for the respondent, among other things, made the following point:

The receipt is but *prima facie* evidence. If the goods were damaged in other hands, but came to the defendants in apparent good order, the owner must seek his redress, either against the party in whose hands they were injured, or under his original contract of shipment. *Bissell vs. Price*, 16, Ill. 408.

By the Court, COLE, J. The only question which we have to consider in this case is whether the receipt given by the company, when the goods mentioned in the pleadings were received from the prior carrier, is conclusive upon them as to the condition of the goods at that time; or whether, notwithstanding the receipt stated that the goods were received in "apparent good order," it was competent for the company to show, by parol testimony, that the goods must have been injured before they came into the possession of the respondent.

The goods in question consisted of several bales of domestics, and were, externally, in good order and condition when received by the respondent, but upon opening them, on delivery to the appellants, they proved to be seriously injured by wet and mould. On the trial the company produced the the witness, James McGrath, who testified in substance that he was the check clerk at Chicago for the Chicago, St. Paul, and Fond du Lac Railroad Company; that it was his duty

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to receive goods and load them upon the cars of the company; that on the 13th of October, 1856, he received from the Michigan Central Railroad Company, six bales and a box directed to the appellants; that the goods appeared to be in good order, were safely loaded in a dry tight car, that afternoon, and forwarded the next day to Janesville; that he gave the receipt for the goods to the Michigan Central Railroad, in which he acknowledged that the goods were in apparent good order; but that the bales were unbroken, and were not opened by him to ascertain the true condition of the goods. So much of this testimony as tended to show that the goods were not in good condition when received by the Chicago, St. Paul, and Fond du Lac Railroad Company, but must have been damaged before they came into their possession, was objected to, on the ground that such evidence contradicted the receipt in that particular, and, therefore, was inadmissible.

Other testimony was likewise introduced by the respondent for the purpose of showing that the goods were promptly delivered by this company to the appellants, and in as good condition as they were received, and that the care exercised by the employees of the company in transporting the goods from Chicago to Janesville, and the state of the weather at the time, clearly established the fact that the goods must have been damaged while in the possession of some prior carrier or warehouseman; and this evidence was objected to for a like reason, as above stated.

The circuit court, however, admitted this testimony, holding that the receipt given by the company was not conclusive as to the actual condition of the goods when received. And in the correctness of this ruling we fully concur. We suppose the receipt given by the company was open to explanation as far as the actual condition of the goods were concerned. Such receipt was, undoubtedly, *prima facie* evi-

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dence that the goods were in a good condition when received by the respondent, and devolved upon the company the burden of showing that they were different; and that the respondent had been imposed upon when the receipt was given. In the present case the goods were externally in a good condition, and the injury was one which could only be discovered on breaking the packages and examining them. Now it is perfectly evident that it would be impossible for railroad companies, and other common carriers, to open and examine every box and bale of goods which comes into their possession to be forwarded, and unless they do so, there would be no safety in the giving of any receipt in respect to the condition of such goods, if the acknowledgment of the receipt is held conclusive and binding upon the carrier.

It seems to us that the better rule upon this subject is that the receipt may be explained, or even contradicted by parol testimony, where the carrier has been imposed upon as to the real condition of the goods, as it is manifest was the case in the present instance; and so the following authorities decide, *Bissel et al. vs. Heman Price*, 16 Ill. R., 408; *Worden vs. Greer*, 6 Watts, 424; Angell on the Law of Common Carriers, § 231.

Some question is made as to whether the original receipt given by McGrath to the Michigan Central Company, should have been received in evidence, after the stipulation as to the admission in evidence of the duplicate or copy, but we think the only effect of that stipulation was to relieve the appellants from the necessity of producing the original receipt, or of proving its contents, in case the agent of the company refused to produce it on notice, and did not preclude the company from offering the original in evidence, if they saw fit to do so.

It is believed that these observations dispose of all the questions necessary to be noticed in the case.

The judgment of the circuit court is affirmed with costs.

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WANZER et al. *vs.* HOWLAND et al.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard November 22, 1859.] [Decided December 14, 1859.

Creditors' Bill—Jurisdiction—Pleading—Trial.

Where a creditors' bill showed that judgment had been entered and execution issued thereon, which were confessed in the answer, it is not competent for the defendant to show that no such judgment had in fact been entered, and thus deprive the court of jurisdiction of the case.

If a court have jurisdiction of the subject matter generally, and whether it has in the particular case, depends upon some fact to be tried; and if that fact be established by a confession in the pleadings, then the jurisdiction has attached, and the parties are estopped by their pleadings to inquire into the fact of jurisdiction.

If a party admits a cause of action set up against him, in a suit before a court authorized to render judgment for that cause of action, such admission does not confer jurisdiction by consent upon the court, even though the cause of action did not exist, but simply admits by the pleadings, facts which it would otherwise have been necessary to establish by evidence, in order to show that the cause of action existed; and the existence of such fact being established, whether by the pleadings, or by proof, the judgment cannot be attacked on the ground that the jurisdictional fact did not exist at the time.

If a court should decide that it has power to try a cause and render a judgment, where by law it has no such power, that decision does not give the power; but the judgment may be questioned in any other court. There is a clear distinction between the finding of a jurisdictional fact, and the decision of a court, that as a matter of law, it has jurisdiction over a cause of action, when the jurisdiction does not exist.

When allegations in a cause of action are so made that the court has authority to proceed and try them, and to render judgment according to its finding, then it has jurisdiction of the subject matter, not otherwise.

This was an action commenced in the circuit court for the county of Racine, by Richard M. Wanzer, David Foote and John A. Kerr, by creditors' bill, October 20th, 1851, against Richmond W. Howland, A. C. Barry, P. Hardy and O. Howland. Most of the facts of the case are stated in the opinion of the court, and will be omitted here. The bill, after stating

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the recovery of the judgment for some $900, also alleged that the defendants in January, 1851, were possessed of goods, accounts and property to the value of $13,000, and of other goods to sell on commission, to the amount of about $4,000; and they sold the whole to John N. Knapp for $5,861 90, for which he gave his promissory notes, payable in one, two, three, four and five years, without interest, and a debt due to Mark H. Newman & Co., whose agent he was, and which he promised to pay; and that one half of the amount of said notes were delivered to Barry, and one half to Howland. The complainants charge that the consideration was inadequate and fraudulent and void as to the defendants' creditors. That defendant Howland sent his notes against Knapp to his father, Oziel Howland, to secure him $1,000, money advanced by him, which complainants aver on belief to be a pretense to cover the property, and also to secure William H. Jenks and Otis White for advances to the amount of about $1,300. The complaint also charges that Oziel Howland procured the defendant, Phineas Hardy, to come to Racine to make disposition of the property for the benefit of the defendant, Richmond W. Howland; that he brought the claims of the defendants, Oziel Howland, William H. Jenks and Otis White, and procured Barry and Howland to confess judgments thereon to the amount of $2,300; that Hardy purchased Knapp's interest in the goods, and also a judgment of about $2,400 in favor of A. S. Barnes & Co., and upon the judgments they caused executions to be issued, levied upon the goods and sold thereunder and that he became the purchaser thereof. That the defendant Barry received from Knapp his proportion of notes for the purchase of the goods, amounting to $2,555,50, and deposited them with Messrs. Strong & Fuller, to be tendered to Knapp in case he should re-sell the goods and accounts to Barry and Howland; that the goods were not re-sold to Barry and Howland, and that Barry assigned the notes as collateral security for the payment of the debt of the complainants; that Knapp sold the goods and accounts to Phineas Hardy, upon condition that he should get up the notes given by Knapp, the debt due to Mark H. Newman & Co., and about $1,300; and that Knapp received out of the goods and accounts $1,000 beyond said sums, and that he has in his hands at least the sum of $1,000. That Hardy obtained possession of the notes deposited by Barry with Strong & Fuller, without consideration and delivered them to Knapp. That Hardy, in

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the summer of 1851, transferred the goods and accounts to Oziel Howland; that he placed Richmond W. Howland in possession of the goods, and gave him full management thereof; that $600 value of goods from Beloit, which had not been sold on execution against Barry & Howland, was also placed in the store and claimed as part of the goods bought by Hardy of Knapp; that the purchase by Oziel Howland from Hardy was a pretended one, for the benefit of Richmond W. Howland; that each of the sales are fraudulent and void as to the creditors of Barry & Howland; that Knapp, Hardy and Oziel Howland have property which ought to be applied upon the judgment and requiring a disclosure from each of the defendants of the matters alleged.

To the bill of complaint, the defendant John N. Knapp did not answer. The remaining defendants answered separately, that the complainants did, on the 30th day of August, 1851, obtain a judgment in the circuit court for the county of Racine, against Alfred C. Barry and Richmond W. Howland, and avered that the signature of Richmond W. Howland to the judgment note, was obtained by fraudulent representations made by John A. Kerr, one of the complainants, and upon the express agreement that the judgment should not be enforced against him or his representatives, but that he wished a judgment entered that he might make Strong & Fuller personally responsible for the amount; that the plaintiffs had received large sums of money from Knapp upon the agreement, and had discharged him from all liability by reason of the judgment, or of the purchase by him of Barry & Howland, of the goods and accounts. They then denied the fraud charged, and also all the other averments of the bill; and stated what was the true consideration of the sale to Knapp. That beside the notes which he gave, he undertook to pay debts to the amount of $6,785 97, due to various persons, including the $1,300 due to Knapp.

The testimony in the case was mainly directed to the issue made upon the fraudulent transfers of the goods to Knapp and to Oziel Howland, but as it is not passed upon by the supreme court, is omitted; except the following: The defendants offered in evidence the judgment roll upon which this action is founded, in order to show that it was entered in vacation and is void. This roll purported to be a judgment against A. C. Barry and others, in favor of the complainants being the one on which this action was founded,

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and was not signed by the judge or court commissioner. The roll was rejected by the court.

The court found the following facts:

"1. That there is now due the complainants from the defendants Richmond W. Howland and Alfred C. Barry, on the judgment mentioned in the pleadings in this action, the sum of eight hundred and four dollars and eighty-eight cents, together with the interest on the same from the 30th day of August, 1851, to the 18th day of April, 1859, amounting to the sum of twelve hundred and thirty-four dollars and thirty-two cents.

"2. That the said defendants, Richmond W. Howland and Alfred C. Barry, as the firm of A. C. Barry & Co., on the 8th day of March, 1851, were the owners of four promissory notes given by one John N. Knapp to A. C. Barry & Co., or bearer, all bearing date January 22d, 1851, and described as follows, to wit: One note of five hundred dollars, due in two years from the date, upon which there had been indorsed $195 50; and three notes of seven hundred and fifty dollars each, due in three, four and five years from the date respectively, all without interest; and that the present worth of the said notes, to wit—on the 18th day of April, 1859, is the sum of three thousand three hundred and fifty-four dollars and eighty-nine cents.

"3. That on the said 8th day of March, 1851, the said defendants Phineas Hardy and Oziel Howland, at Racine, in the State of Wisconsin, had said notes in their possession, and then and there wrongfully converted said notes to their own use and benefit, and then and there received to themselves the full amount of said notes, and that they thereby became and now are liable to account to the creditors of the said A. C. Barry & Co., for the full amount and value of said notes, and that the said fund is now in their hands and amounts to three thousand three hundred and fifty-four dollars and eighty-nine cents.

"4. That the said complainants, by virtue of their proceedings in this action, have acquired an equitable lien upon said fund, and are entitled to have their said debt satisfied therefrom, and that the said complainants are entitled to judgment against all of the said defendants for the amount of their said judgment, and interest amounting to the sum of twelve hundred and thirty-four dollars and twenty-two cents, with costs, to be taxed against the said defendants."

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Upon this finding judgment was entered April 18, 1859, and this appeal was taken.

Paine & Millett, for the appellant, made the following points:

1. The judgment, execution and sheriff's return being all absolute nullities, the circuit court had no jurisdiction over the subject matter to make any decree whatever in the case in favor of the complainants.

2. The answer of the defendants, admitting the judgment as stated in the bill, did not confer jurisdiction upon the court. Rev. Stat., 1849, chap. 84, § 7; *Wright vs. Douglass*, 10th Barb., 99; *McDonald vs. Crocket*, 2d McCord, 135; *Fairly vs. Fairly*, 1st McCord, 513; *Bouroughs vs. McNeal*, 2d Dev. & Batt., 297; *Dakin vs. Demming*, 6th Paige, 99; *Harrington vs. People*, 6th Barb., 610; *Adams vs. Saratoga & Wash. R. R. Co.*, 11th Barb., 414; *Broadhead vs. McConnell*, 3d Barb., 175; *Chalmers vs. Hatch*, 19th Maine, 124; *Brinkerhoof vs. Brown*, 4th J. C. R, 671; Adams' Equity, 130; *Jeffries vs. Harbin*, 20th Ala., 387; *Abel vs. Bloomfield*, 6th Texas, 263.

Cary & Pratt, for the respondents, commented in their brief upon the facts of the case, to sustain the finding of the circuit court; and answered the points made by the appellants as following:

The question of jurisdiction urged by the counsel in the court below, and insisted upon here, is not in the case. The recovery and docketing of the judgment, the issuing and return of execution, and the then present existence and binding force and efficacy of the judgment, are fully alleged in the bill, and admitted by all the several answers. These facts established by the record could not be impeached or invalidated by evidence. *Grandiu et al. vs. Le Roy & Smith*, 2 Paige, 509; *Bank of Utica vs. City of Utica*, 4 Paige, 399; *Cumming vs. Mayor, &c.*, 11 Paige, 596; *Bank of Utica vs. Merserau et al.*, 3 Barb. C., 528, 574.

By the Court, PAINE, J. This was a creditors' bill, brought by the respondents against the appellants. There were the usual allegations of the recovery of a judgment at law against the defendants, Barry & Howland, issuing and return of exe-

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cution, &c. The answers admitted the existence of the judgment at law as alleged, and the issue and return of the execution thereon. But at the trial the defendants offered evidence to show that there was no judgment ever rendered, for the reason that the record was not signed, as this court held necessary; 5 Wis., 138; the decision having, however, been made after the answers were put in. This evidence was rejected, and the principal question argued here by the appellant's counsel, was as to its admissibility. He urged that the existence of the judgment, which the bill was filed to aid, was essential to the jurisdiction of the court, and that being so, the answer of the defendants admitting the judgment did not deprive them of the right to object to the jurisdiction for that cause, upon the ground that when the court has no jurisdiction of the subject matter consent cannot confer it. But we think the counsel has misapprehended the application of this principle; and that it applies only where the court has no authority to adjudicate upon the subject matter at all, and not where its general jurisdiction over it is conceded; and the only question is whether in the particular case such facts exist, as bring that case within this general jurisdiction.

Thus, if a court has only civil jurisdiction, and if it should sentence a party for a crime, even though he went before it and consented to be tried, its judgment would be a nullity; because the consent could not confer the jurisdiction. But, if the court had authority to try him for that crime, and to sentence him if guilty, and to a proper indictment he should plead guilty, he could not afterwards, upon that state of pleadings, claim the right to prove that he was not guilty. For although the power of the court to inflict the sentence depends on the guilt of the party, yet it is not upon the abstract question of guilt, but whether the guilt has been made legally apparent in the suit; and, therefore, the party having admitted it according to an authorized method of proceeding

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in such suit, he could not, without withdrawing his plea of guilty, object to the power of the court to render judgment upon the ground that he was really not guilty. So, if a court has authority to entertain suits upon promissory notes, if such a suit is brought, and the existence of the note averred, if the defendant in his answer admitted it, he could not upon that pleading be permitted to disprove the existence of the note.

And, neither in the criminal case supposed, would the offer to prove innocence, nor in the last, the offer to prove non-existence of the note, raise any question as to the jurisdiction of the court. For although in the one case, guilt, and in the other, the note, constituted the entire ground of action, and was essential to authorize a judgment; yet that goes only to the cause of action, and not to the jurisdiction of the court. For if the court has authority to render a judgment for the cause of action set forth in the complaint, then it has jurisdiction of the subject matter of the suit, and whether the cause of action exists or not, is the very question it is to try. And this, of course, should then be tried according to the established rules and methods of proceeding. Where issue is taken upon a fact, it is to be tried upon the evidence; where it is admitted by the pleadings, that establishes it for all the purposes of the suit. If a party, therefore, admits a cause of action set up against him in a suit before a court which has lawful authority to render a judgment for that cause of action; this is not conferring jurisdiction by consent upon the court, even though the cause of action did not exist; but is simply admitting by the pleadings facts which it would otherwise have been necessary to establish by evidence. The power of the court to try the case being conceded, the parties are as much bound by admissions of facts in pleading, as they would be by a verdict establishing them upon the trial.

We think these considerations dispose of the question pre-

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sented here. The general jurisdiction of the circuit courts in suits by creditors' bill is conceded. Undoubtedly the existence of the judgment at law constitutes the whole foundation of the right of action in such a suit. But the power of the court to entertain the suit and to give the proper relief, if such judgment is shown, being conceded, the question of its existence becomes then a mere question of fact, relating to the cause of action, and is to be determined either upon the pleadings, or the evidence, in the same manner and by the same rules that such questions of fact are determined in all other cases. The answers, therefore, having admitted the existence of the judgment, the defendants could not introduce evidence to disprove it. They were estopped by their pleadings. And it was not contended that it could be done, except for the purpose of disproving jurisdiction over the subject matter.

But we think, as already stated, such proof would not raise that question. To determine that, the facts stated in the complaint must be taken as true. If they then present a case which authorizes a judgment, the court has jurisdiction of the subject matter. It is conceded here that the complaint did present such a case. The very question which the court had the jurisdiction to try was whether that cause of action really existed; and the proof offered tended only to show that it did not exist, and not to show that the court had no jurisdiction to determine it, and render a judgment if it did exist. Disproving a cause of action is not showing that the court had no jurisdiction of the subject matter. The question, therefore, of conferring jurisdiction by consent was not presented, because there was no attempt to submit to the court any question, which by law it had no authority to determine.

Suppose the existence of the judgment had been denied by the answers, and the court had tried the question and

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found its existence and rendered judgment; could that judgment have been attacked collaterally, on the ground that there was no jurisdiction over the subject matter? Clearly not; as little could it be done, if admitted by the pleading. But it might be done in either case, if there was no jurisdiction of the subject matter.

We do not think the essential facts constituting the cause of action here, are to be considered jurisdictional facts, within the rule so frequently and often so rigidly applied to the action of inferior tribunals and officers. But, even if they were, the same result must follow. For even if the existence of the judgment was a jurisdictional fact, it was a fact triable in that suit. And if triable, it must be tried according to established rules. If denied, it must be proved; if admitted, it would then have been legally ascertained for all the purposes of the suit.

But I do not mean by this to say that the judgment of every tribunal as to its own jurisdiction is conclusive. That I have always denied. If a court decides that it has power to try a case and render a judgment, which by law it has not, such decision does not give it the power. Its judgment may be questioned any where for want of jurisdiction. But if a tribunal is authorized to act upon a certain state of facts, and also to try whether the facts exist, then if they are properly alleged before it, and the parties are legally notified and have opportunity to contest them, the finding of such a tribunal upon those facts would be the finding of a competent tribunal, and ought to be conclusive until reversed in a direct proceeding.

I think there is a clear distinction between the finding of such facts and the decision of a court, that as a matter of law it has jurisdiction where it has none. Because in the one case it has authority to try the facts; in the other it has no authority at all, though it decides that it has. And although

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the authorities upon this subject are full of uncertainty, this distinction is recognized, and seems to me to rest upon solid reasons. It is recognized in *Brodhead vs. McConnell*, 3 Barb., 187–8; and in *Betts vs. Bagley*, 12 Pick., 582–3; also, in *Brittain vs. Kinnard*, 1 Brod. & Bing., 432; which is the leading case upon the subject. In that case the magistrate had jurisdiction to seize gunpowder in any boat on the river Thames. Under that authority he seized and condemned a vessel with masts, which was admitted not to be a boat within the act. He was sued in trespass, but the court held his finding, that it was a boat conclusive.

And this case establishes what I believe to be the true rule, that although such facts have been treated as jurisdictional, yet that, strictly speaking, they are not so. Because, while conceding that the vessel seized was not a boat within the act, they yet held that the magistrate had jurisdiction; because he had power to decide whether it was a boat or not, as a part of the offense charged, and this power constituted the jurisdiction and not the actual fact. All suits and judicial proceedings are instituted to try questions of fact, and when they are instituted with proper allegations before a tribunal authorized to try them, it is not sound logic to say that the jurisdiction of this tribunal depends on the actual existence of the facts alleged. And the neglect of this distinction, growing out of the great strictness with which the proceedings of inferior tribunals have been regarded, has, I think, given rise to much confusion and inaccuracy, and has led courts, in many instances, to hold facts jurisdictional which were not so. The true rule would seem to be in all cases, that where the allegations are so made that the tribunal has authority to proceed and try them, and to render judgment according to its finding, it has then jurisdiction of the subject matter. I have thus alluded to what I conceive to be the true rule in respect to such so called jurisdictional facts, for

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the purpose of showing that even if the existence of the judgment here had been such a fact, it was still competent for the court below to have tried and determined it conclusively, unless directly reversed, and that therefore it was triable by the same rules that govern the trial of all other questions.

When looking into the evidence as to the other matters alleged, we think it sustains the finding of the court below.

The judgment is affirmed with costs.

DYE *vs.* MONTAGUE.

APPEAL FROM CIRCUIT COURT, WALWORTH COUNTY.

Heard October 20, 1859.] [Decided December 14, 1859.

Contract for Land—Vendor and Vendee.

Where M. entered into a contract with D. to make a deed of certain land within one year; and on the third day after the year expired, he made such deed and delivered it to D.; held that M. was not in default for not making the deed before that day. A vendor of real estate, who has covenanted to convey by a day certain, is not in default until the party who is to receive the conveyance, being entitled thereto has demanded it, and waited a reasonable time.

This action was brought by Enoch P. Dye against Obed Montague, to recover damages for the breach of a written contract for the conveyance of land from Montague to Dye. The contract acknowledged the receipt of the consideration of $400, for which Montague bound himself to make a deed free and clear of all incumbrances, in one year from the date, of 40 acres of land in the state of Iowa; and bound himself under a penalty of $400 if he failed to make the deed. The complaint averred a breach, and demanded the $400, &c. The answer alleged that he had made a good and sufficient

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deed and delivered it; and that Dye had since the making the deed offered to sell the land, and exercised acts of ownership over it.

On the trial of the cause, Dye was examined as a witness, and testified:

That on the 30th day of August, A. D., 1858, a gentleman rode up to the plaintiff's house and said to plaintiff that he had brought those deeds to him that Montague and another man were to deliver to him on certain contracts—the witness replied that he should not take them unless he was obliged to by the contracts, and he believed he was not. He then threw down the deeds upon the floor and turned and went away. He did not take the deeds into his hands. He does not know who picked up the deeds from the floor. Did have deeds in his hands the next day. Witness and son went to Whitewater next day, and took the deeds along to compare them with the contract. Cannot tell where the deeds have been kept all the time. The deeds were laid away by some of my family. At the time the deeds were tendered him, thought the time in which they were to be delivered had expired, was not sure, but thought so. Did examine and compare the deeds the next day, with the contracts which were in the hands of Mr. Murphy of Whitewater.

After he had examined the contracts in Whitewater the next day, and compared them with the deeds, he called upon the defendant in presence of witnesses, and demanded the money on the contract. He told the defendant that he had failed to fulfill his contract, and that the plaintiff demanded the money on it. Never have demanded deed of the defendent, and never have returned or offered to return the deed to the defendant, after it was left at witness' house on the 30th day of August, 1858.

The defendant then moved the circuit judge that the plaintiff be nonsuited. Whereupon the judge did order and decide that the plaintiff should become nonsuited, to which order and decision of the judge the plaintiff excepted.

And the judgment of nonsuit being entered, Dye appealed to this court.

J. M. Bingham and N Rollins, for appellant.

N. S. Murphy, for the respondent.

By the Court, Cole J. We see no good reason for setting

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aside the nonsuit in this case. The action was brought upon a land contract. The respondent, in consideration of four hundred dollars to him paid, agreed to execute and deliver to the appellant, within one year from the date of the instrument, a deed of certain real estate. On the third day after the expiration of the year, he made, and caused to be tendered to the appellant the deed, who refused to accept it, saying that he would not take it unless he was obliged to by the contract. It does not appear that any objection was made to the deed, and it was probably refused because it was not tendered within the year. The deed was thrown upon the floor of the appellant's house, and it appeared that he afterwards had it in his possession. But he doubtless did not intend receiving the conveyance, if the respondent was in default, for he seasonably demanded the four hundred dollars which he had paid upon the contract, and upon its being refused, brought his action to recover it. These facts appearing on the trial, the circuit court granted a nonsuit on the motion of the respondent.

We do not discover any peculiar stipulations in this contract, which takes it out of the rules applicable to such agreements; and the following authorities show that a vendor of real estate, who has covenanted to convey by a day certain, is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and waited a reasonable time to have the same drawn and executed. *Fuller vs. Hubbard et al.*, 6 Cow., 1; *Hackett vs. Huson et al.*, 3 Wend., 249; *Connelly et al. vs. Pierce*, 7 id., 129.

Judgment of the circuit court is affirmed with costs.

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ADMINISTRATORS OF JENNINGS *vs.* CHANDLER.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard October 19, 1859.] [Decided December 14, 1859.

Administrator, &c.—Partnership.

Where a surviving partner has mixed the goods of the firm with his own, sold them together and kept no separate account of the sales, and used the proceeds for the support of himself and family, such conduct is an abuse of his trust; and the court will grant an injunction against him, appoint a receiver of the assets of the partnership, and direct an account.

If the survivor desires to retain possession of the partnership property, and continue the business, he may do so upon giving security to account for the assets of the firm, apply the proceeds to the payment of the firm debts, and pay over the surplus to the representatives of the deceased partner.

An administrator is entitled to inquire into the condition of a copartnership between the deceased and another, even though the firm is declared insolvent, in order to reduce the indebtedness as much as possible, and for that purpose may maintain an action against the survivor.

This was an action brought by the administrators of Rufus P. Jennings against Samuel Chandler, to compel an account of the partnership existing between Jennings and Chandler in Jenning's lifetime, in the dry goods business. The complaint averred that at the death of Chandler the stock of dry goods, &c., amounted to $16,000 or $20,000, and other property to from $10,000 to $20,000. That since the decease Chandler had continued to occupy the store and carried on business in his own name, by buying goods and mixing them up with the goods of Chandler and Jennings; selling the goods of the late firm indiscriminately with his own, mixing the proceeds, without keeping a separate account of each. That Chandler had pretended to take an inventory of the goods on hand, at New York prices, and they amounted to $14,934 45, and that he had charged himself with them at that price, and so claimed them as his own. That Chandler had been collecting the debts due the firm to the amount of $5,000 or more, and had not applied the money received to the payment of the debts of the firm, and which amounted to about $10,000; but he had used it to purchase new goods on his

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own accouut, and about his individual business. That Chandler denied the right of the administrators to meddle with the property, as the firm was insolvent; but the complaint averred that this pretense was not true, but the property of the firm was of the value of at least $7,000 more than the debts owing by it; and on a fair settlement thereof there would be at least $4,500 coming to them as part of the estate of their decedent. That he refused to allow them to examine the books and papers relative to the estate, and asked for a receiver and injunction.

This complaint, accompanied by the affidavit of Stevens, one of the administrators, containing nearly the same statements, was presented to the circuit judge of Milwaukee county, who made an order that Chandler shew cause at the end of four days why the injunction should not issue and the receiver be appointed.

The defendant showed cause by his answer and several affidavits of his clerks and others, supporting the answer. The answer admitted the partnership and put in the articles of copartnership, and the death of Jennings; that the goods inventoried at $14,934 45, and other property at $10,630 66, but claimed that the items of bills receivable and book account, amounting to $6,150 49, were not of over 70 cents on the dollar in value. It admitted the occupancy of the store, but for the purpose of settling up the partnership affairs. It claimed that at the time of Jenning's death the firm was indebted $31,000, and the assets were not sufficient to pay the amount, and that he had purchased the new goods to enable himself to meet these claims, after he had taken the inventory, &c., and charged himself with the amount. That the partnership was insolvent. It denied the use of the moneys, &c., received about his individual business, beyond the ordinary and necessary expenses and support of himself and family, but insisted that he had conducted the business for the best interest of the firm, and that the appointment of the receiver would render the firm hopelessly insolvent.

Upon this answer coming in the circuit judge made the following order:

It is ordered by the court that the defendant may retain possession of the partnership property and effects mentioned in the complaint, on his giving good security to be approved by the court, in the form of a bond to the plaintiffs in the penal sum of ten thousand dollars, to be executed by the defend-

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ant and one or more sureties, conditioned that said defendant shall well and truly account for the property and assets of the firm of Chandler & Jennings which came to his hands as surviving partner, and dispose of them according to law, and apply the proceeds, first, to the payment of the debts owing by said firm, and pay to said plaintiffs the surplus moneys and funds remaining after the payment of the debts of said firm, or such proportion of said surplus funds as said plaintiffs may be entitled to, and in case such bond shall be executed and and filed in this action within five days after the service of a copy of this order on said defendant, then said motion for an injunction and receiver will be denied, otherwise it will be granted.

And it is further ordered by the court, that it be referred to Robert N. Austin, one of the commissioners of this court, to take an account of the property and effects of the late firm of Chandler & Jennings, and that he state—1. The property belonging to said firm at the time of the decease of said Jennings, and the value thereof, both at cost and retail prices. 2. The amount of debts owing by said firm, and to whom, at the time of the decease of said Jennings. 3. The amount of property of said late firm now in the hands of said Chandler. 4. The debts paid by said Chandler since the death of said Jennings.

And it is further ordered that the parties to this action and any other persons, may be examined as witnesses in this action before said commissioner.

And it is further ordered that the plaintiffs shall at all times have access to the books of said late firm of Chandler & Jennings, and may have the right to take copies thereof, and that the defendant permit said plaintiffs so to do.

From this order the defendant appealed to this court.

Butler, Buttrick & Cottrell, for the appellant.

1. The original order served on the defendant, was to show cause "why an injunction should not issue and a receiver be appointed pursuant to the prayer of the plaintiffs' in their bill of complaint." The order appealed from, however, authorizes the court commissioner to take an account as fully as though a decree had been rendered upon a final hearing of the case. The court erred in making such order.

2. The plaintiffs were not entitled to the order for an injunction and a receiver upon *any conditions* upon the case submitted in the pleadings and affidavits. The same princi-

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ple applies under the code that applied under the old chancery practice, that where the answer denies the whole equity of the bill, an injunction will be denied.

The plaintiffs allege, *on information and belief*, that on a fair settlement of the business of the firm, there will be coming out of the assets a surplus to the estate of the deceased. If this be true, then the administrators of Jennings have no right in court. They cannot, under any circumstances, have any interest in any of the assets of the firm, because they have no interest except in the surplus after the partnership debts are paid, the estate of Jennings being bankrupt.

Courts of equity however will not appoint a receiver of the partnership assets, on the application of one partner, against his co-partner, except in cases of the grossest abuse and the strongest misconduct on the part of the managing partner. The surviving partner has the exclusive right to the books, choses in action, and assets of the partnership, for the purpose of winding up the partnership affairs.

The answer shows that the defendant has made extraordinary efforts to pay off the partnership debts. The goods purchased by him were purchased for the benefit of the firm; the moneys derived therefrom were applied to the payment of its debts; and the defendant positively denies that he has diverted any of the partnership assets to his individual use.

Downer & La Due, for the respondents.

Chandler has kept no *separate account of the sales of the goods of the firm*, and cannot tell how much money he has received for those goods, or whether he sold them at a profit or loss. The business of the firm and the proceeds of the goods of the firm, are completely mixed with his individual business; and out of this business of the firm and his individual business, all mixed up together, he is paying debts, and *supporting himself and family, and clerks*, and without keeping any account of how much money he appropriates to himself for the *ordinary and necessary expenses* of himself and family. Whether these *ordinary* and necessary expenses are five thousand dollars a year or less, we are not informed. A mere statement of the case shows *gross abuse* of his authority and rights as surviving partner, and such abuse as warrants the appointment of a receiver. According to Chandler's own statement, it is utterly impossible to ascertain the amount of money he has received for the goods of the firm sold by him as surviving partner.

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By the Court, COLE, J. We have come to the conclusion to affirm the order of the circuit court in this case. And we do so upon the ground, that the appellant does not deny in his answer, all the allegations of improper management of the partnership affairs, made in the complaint, with such fullness and particularity as show that there is no equity in the complaint. Indeed, there are circumstances and facts admitted in his answer, which go to show that there is danger of an abuse or misapplication of the partnership assets. We refer to the admission in the answer, that since the death of Jennings, he has purchased goods on his own account, and caused them to be placed in the store and sold in connection with the goods of the firm; and it does not appear that any separate accounts are kept of the sales of his own property, and the property of the firm. In this confusion and mixing up of the affairs of the partnership, and of his own personal matters, we cannot see how a proper settlement of the partnership business can ever be arrived at, between him and the administrators. It will be impossible to determine what expenses and what profits are justly chargeable to the partnership, and what not. Although the appellant, as surviving partner, has the exclusive right to the books, choses in action, and assets of the partnership, for the purpose of closing up the affairs of the firm, he is not authorized either by general principles of law, or any stipulation in the articles of copartnership, to replenish the stock and continue the business in the confused manner he has done. Again, he says in his answer that no part of such proceeds of the business has been applied to his personal and individual liabilities, beyond the ordinary and necessary expenses of supporting himself and family. But certainly the partnership ought not to be charged with the support of him and his family. This is obvious. Some stress is laid upon the fact that the appellant denies, that upon a fair settlement of all the business of the firm and

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the payment of the debts owing by it, that there will not be coming out of the assets of the firm, to the administrators of the estate, any sum whatever.

Admit that the partnership will prove to be insolvent on final settlement, yet it is manifest that the administrators have a direct interest in reducing the liabilities of the partnership as much as possible, since the estate they represent may be holden for any such liability, after the partnership means are exhausted. If the appellant wishes to retain possession of the partnership property and continue the business, he can do so by giving the security required in the order. Under the circumstances we do not think this an unreasonable or onerous condition. See *Hartz vs. Schrader*, 8 Ves., 317; *Burden vs. Burden*, 1 Ves. & B., 170; *Franklin et al. vs. Robinson*, 1 J. C. R., 157; *Bradford vs. Kimberly et al.*, 3 id., 431.

The order of the circuit court is therefore affirmed.

POWER *vs.* CATLIN et al.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 9, 1859.] [Decided December 14, 1859.

Equity—Mortgages—Repeal of Statute.

After the act allowing a non-resident to come in, by petition, and defend in a chancery case, and that the petition should operate to set aside a sale of mortgaged premises, had been repealed, the rights of the defendant to set aside the sale are extinguished by the repeal; and the defendant can only pursue his remedy against the proceeds of the sale.

It is competent for the legislature to repeal an act which has conferred a right on a party to have a decree of a court opened and reheard.

The cases of *Berry vs. Nelson*, 4 Wis., 375, and of *Berry vs. Doty*, 5 Wis., 695, examined and explained.

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This case comes to this court upon an order made by the judge of the circuit court of Milwaukee county, denying the petition of the appellants, David W. Catlin, Lorenzo Snow, and E. Porter, to set aside the decree of confirmation of a sale entered in that court. The respondent, David G. Power, filed his bill in the circuit court of Milwaukee county, under the old practice for the foreclosure of a mortgage, making the appellants parties by publication under § 18, of chapter 84, of the old statutes. After publication an order was entered taking the bill as confessed by the appellants, and on the thirty-first day of May, 1855, the usual decree of foreclosure was entered under which the property was sold to Lemuel W. Weeks. On the 15th day of May, 1858, the appellants filed their petition to set aside this sale, on the ground that they were non-residents, and that they had not received notice of the decree, and had a good defense; and an interest as creditors of the defendant and mortgagor, Alanson Sweet. The order permitted them to appear and answer the bill of complaint; but that the sale heretofore made in the cause, be in nowise affected by the order, but stand confirmed. From so much as orders the sale to stand, this appeal is taken.

E. Mariner, for the appellant.

Winfield Smith, for the respondent.

By the Court, Cole, J. It appears to us that chapter 101, Session Laws, 1856, is decisive of the question raised upon this appeal. Section 36, chapter 84, R. S., 1850, provided, that in case an absent defendant, against whom a decree should be made within six months after notice was given him of such a decree, or within three years after the decree had been made, in case no notice had been given, should petition the court touching the matter of such decree, he might be permitted to appear and make a defense to the bill filed, on complying with such reasonable terms as the court might impose. And in the case of *Berry vs. Nelson*, 4 Wis., 375, this court held that this provision of the statute applied as well to foreclosure suits as other suits in

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chancery; and that the effect of letting in the non-resident defendent to answer, was to set aside all proceedings as to him, subsequent to the entering his default, including the sale. At the next session after the opinion in the case of *Berry vs. Nelson*, was given, the legislature passed the law of 1856, which provides that sectiion 36, chap. 84, should not be so construed as in any way to affect the validity of any sale made pursuant to any decree of the court, before the filing of the petition of such absent defendant.

The consequences of setting aside sales made under decrees of courts of equity, were at once perceived to be very serious, and no person was safe in buying property in a cause where there was a non-resident defendant, who could come in under this enactment in the R. S. So the legislature very wisely and properly interfered, and provided that when the non-resident was let in to answer pursuant to the statute, the validity of the sale should not in any wise be affected by the proceeding, and the party should pursue his remedy only against the proceeds of the sale. Such is the evident intent and object of the legislature in enacting the amendatory act. We, therefore, think the circuit court properly refused to set aside the sale which had been made on the foreclosure decree in the present case.

It is contended, however, by the counsel for the appellant, that the law of 1856 could not apply to a case which had gone to a decree before the law took effect. The decree of foreclosure was rendered in May, 1855; the sale of the mortgaged property was had in July of the same year, and the sale was confirmed in September following. There is certainly nothing in the language of the law of 1856 which authorizes the conclusion that the legislature did not intend it should apply to a case like the one at bar; and we think it was competent for the legislature to make it so apply, if they saw fit to do so. It is assumed by the counsel for the appel-

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lant that this court decided otherwise in the case of *Berry vs. Doty et al.*, 5 Wis., 605; but this is a mistake. The court held that the rights of the appellant in that case had been fixed, as they were defined under the Revised Statutes, by the filing of his petition, and in all other respects complying with the requirements of the thirty-sixth section, and that those rights were determined by the consideration and judgment of the court at a former term, and before the amendatory act was passed; and, therefore, that the law could not operate to impair or defeat rights which had become judicially established. But this case is clearly distinguishable from that of *Berry vs. Doty et al.* Here no petition was filed, or application made to the court until more than two years after the law of 1856 went into operation. No rights have become fixed by an adjudication and judgment of the court. It was only by virtue of the thirty-sixth section that the non-resident defendent could come in and have the sale set aside. And this right being now taken away, he must pursue his other remedies under the statute.

The order of the circuit court refusing to set aside the sale is, therefore, affirmed.

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PIERCE *vs.* JUNG.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard July 13, 1859.] [Decided December 14, 1859.

Contract—Debt—Damages.

An action of debt for the payment of a stipulated amount, can be maintained for the breach of an agreement, which provides that "if either party shall refuse to perform this agreement, the party so refusing shall forfeit and pay to the other party the sum of $1000, as stipulated damages;" if it shall also appear from the case, that independently of the agreement, the damages would be wholly uncertain and incapable of being ascertained except by conjecture.

This case comes before the court on an appeal from a judgment of the circuit court of Milwaukee county. The plaintiff, John D. Pierce, filed his declaration under the old practice in debt, upon a contract, the substance of which is stated in the opinion of the court. The defendant, Adelbert Jung, demurred, "That the undertaking or agreement in said declaration mentioned, so far as the same is for the payment of money, is collateral, and debt does not lie. The amount stipulated to be paid by said agreement, is in terms a penalty, and is not liquidated damages, and no action lies thereon unless actual damage is alleged."

The court overruled the demurrer, and the defendant pleaded *nil debit*, and on the trial the plaintiff read the agreement and proved a breach by the defendant, and rested his case. The defendant then offered to prove that the goods mentioned in the agreement were not worth the price agreed to be paid to the plaintiff, and that the plaintiff had suffered no actual damages by reason of the non-performance of the contract on the part of the defendent, to which the plaintiff, by his counsel, objected, for the reason that the damages were liquidated by the contract; and the circuit judge declared his opinion that the damages were liquidated by the contract, and rejected the testimony as inadmissable, to which opinion the defendant excepted. And afterwards, the parties having severally rested the case, the circuit judge among other things, charged the jury that if they found for the plaintiff, their ver-

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dict should be the amount of damages mentioned in the contract, with interest from the date of the breach of the contract. The judgment was rendered for the plaintiff, and the defendent appealed to this court both on the overruling the demurer, and the instruction to the jury.

E. Mariner, for the appellant.

Butler, Buttrick, & Cottrell, for the respondent.

By the Court, PAINE, J. This was an action brought by the respondent against the appellant, for a sum claimed as stipulated damages, for failure to perform an agreement for the sale of a stock of goods, by the appellant to the respondent, By the agreement an inventory was to be taken, the vendee was to pay one-fourth of the amount down, and to execute and deliver to the vendor, three notes, secured by a chattel mortgage on the goods, one to be for $1800, the second for $1200, and the third for the balance. The agreement also contained the following provision: "And it is expressly agreed that if either party shall refuse to perform this agreement, the party so refusing, *shall forfeit and pay to the other party, the sum of one thousand dollars, as stipulated damages.*

On the trial the defendant offered to prove that the goods were worth less than the plaintiff had agreed to give for them, and that he had suffered no actual damage. But on objection, the evidence was rejected, on the ground that the agreement had provided for the amount of damages in case of a failure to perform by either party. The only material question presented on the appeal, is whether this ruling was correct.

The decisions on this subject are somewhat conflicting. On the one hand, they lean towards treating such provisions as in the nature of penalties, and to do so, have sometimes disregarded the positive and explict language of the parties

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On the other, they go for upholding contracts as made, treating the parties as equally competent to provide for the amount of damages to be paid, in case of failure to perform, as to determine any other matter contained in them. The case of *Astley vs. Weldon*, 2 Bos. & Pul., 346; and *Kemble vs. Farren*, 6 Bing., 141, are strong illustrations of the first class; and in *Crisdee vs. Bolton*, 3 Car. & Payne, 240, the opposite doctrine is very clearly stated. But even the first class of cases concede the power of the parties to liquidate the damages by their agreement in case of a non-performance. And they profess also to go upon the intention of the parties. And perhaps the only real difference between the two, is that the former take greater liberties than the latter with the words of the parties, in determining what the intention is. They pay more attention to the whole nature and object of the agreement, than to the precise words, in determining whether the intent was to create a penalty, or provide for liquidated damages.

Thus, in *Kemble vs. Farren*, the agreement contained some provisions, upon the breach of which, the damages would have been wholly uncertain, and incapable of any definite ascertainment. But it also had others of a comparatively unimportant character, one of which was that the plaintiff should pay the defendant £3 6s. 8d., every night the theatre was open. And there was a clause that upon the failure of either party to fulfil his agreement, *or any part thereof*, he should pay to the other £1000, which was expressly declared to be "liquidated damages, and not a penalty, or in the nature thereof." Yet, notwithstanding this language, which the court admitted to be as explicit as language could be; they held it to be a penalty, because, by the very terms of the agreement, it applied as well to a breach of the most unimportant provisions, where the actual damages was clearly ascertainable, as to those of a different character As, for in-

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stance, if the plaintiff had failed to pay the £3 6s. 8d., on any one night, he would, by the agreement, have forfeited the one thousand pounds; from which the court held that, notwithstanding the positive language to the contrary, the intention was to provide for a penalty. But this case, and all those of a similar character lay great stress upon the point, whether upon a breach of the agreement the damages are capable of being readily and certainly ascertained. And they all admit that where such is not the case, that fact will have a controlling influence in determining that the intention was to provide for stipulated damages, and not for a penalty.

The authorities upon the subject, both English and American, are collected and reviewed in chap. 16 of Sedgwick on Measure of Damages. He deduces from them, among others, the two following propositions, which, we think, fairly result from the authorities, and are applicable to this case: 1. That if the sum be evidently fixed to evade the usury laws, or any other statutory provision, or to cloak oppression, the courts will relieve by treating it as a penalty. 2. That where, independently of the stipulation, the damages would be wholly uncertain, and incapable of being ascertained except by conjecture, then the damages will usually be considered as liquidated, if they are so denominated in the instrument.

In this case there is nothing in the nature of the agreement, or in the amount fixed, that would warrant us within any of the authorities, in holding it a penalty against the express language of the parties. The exact amount of the stock of goods does not appear, but it does appear that it was more than $4000; how much more we cannot tell. It is not a case, therefore, where the court can see that the amount fixed is greatly disproportionate to the probable damage. And it is very clearly a case where, upon a breach, the real damages are incapable of being definitely ascertained. Who could form any accurate idea of the plaintiff's damage? How could

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it be shown before a jury? It would be almost impossible. Every thing that may contribute, in any manner, to the prosperity of a merchant, would have to be known. The condition of the markets, the state of trade, the plaintiff's popularity and probable amount of custom, and many other things which cannot be reduced to any accurate measure. For these reasons we think this agreement should be construed as providing for liquidated damages, notwithstanding it contains the word "forfeit," which were it of a different character, might be seized on as a ground for holding it a penalty.

Having come to this conclusion, it follows that debt was the proper action, under the old system, it being for a sum certain, liquidated by the agreement of the parties. The demurrer was, therefore, properly overruled, and the ruling of the judge on the trial was correct.

The judgment is affirmed with costs.

LEGGETT *vs.* JONES.

APPEAL FROM CIRCUIT COURT, DODGE COUNTY.

Heard November 15, 1859.] [Decided December 14, 1859.

Contracts—Promissory Notes—Frivolous Pleadings.

An agreement to pay money in the form of a promissory note, except adding the words "with exchange on New York," is a contract for the payment of money only, and may be declared on as such. A demurrer to the complaint for the reason that it is not such a contract, will be declared frivolous.

This complaint was in the usual form under the code, setting out the contract sued on, and claiming judgment for the principal and interest; for which judgment was rendered. The other facts will be gathered from the opinion of the court.

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Sloan & Lander, for the appellant.

1. A demurrer can only be regarded as frivolous when its insufficiency as a defense must be so glaring that the court can determine it upon bare inspection, without argument. *Nichols vs. Jones*, 6 Pr. R., 358; *Lefferts vs. Snediker*, 1 Abbott, 42.

2. The instruments sued on are not promissory notes, although so declared upon; and are not instruments for the payment of money only, within the meaning of sec. 68 of the code. A promissory note is a written promise to pay a certain sum of money unconditionally, in a fixed time, and must be for the payment of money only, unconnected with any other act, and not variable. Rates of exchange depend upon various circumstances; the price fluctuates as much as wheat or any other commodity. Story on Promissory Notes, §§ 17, 18, 19, 20; Edwards on Bills, 138, 140; *Smith vs. Nightingale*, 3 E. C. L. R., 452; *Ayrey vs. Fearnside*, 4 M. & W., 168; *Dilly vs. Van Wie*, 6 Wis., 209.

2. The instruments sued on are more than a promise to pay a certain sum of money at a certain time. The clerk nor the court cannot assess the plaintiff's damages without taking proof of the rate of exchange on New York. The damages are unliquidated. The instruments themselves do not show the extent of the defendant's liability. The rate of exchange must be proved *aliunde*.

R. Judson, for the respondent.

The expression in these notes, "with exchange on New York," was nothing more or less than saying the amount should be paid in specie or par money in New York.

By the Court, PAINE, J. This action was brought upon two instruments declared on as promissory notes, which were in the following form:

"NEW YORK, May 30, 1858.

"Thirty days after date, I, the subscriber, of Beaver Dam, county of Dodge, state of Wisconsin, promise to pay to the order of S. & T. Lawrence & Co., *with exchange on New York*, two hundred twenty-four dollars, at the Dodge County Bank, Beaver Dam. Value received. E. J. JONES."

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The complaint was demurred to as not stating facts sufficient to constitute a cause of action; and the plaintiff had judgment for the frivolousness of the demurrer, from which the defendant appeals. The only ground relied on for reversing the judgment is, that the question whether the instruments declared on were contracts for the payment of money only within the meaning of sec. 68 of the Code, is sufficiently doubtful to relieve the demurrer of the character of frivolousness. It was suggested in the first place that they were not promissory notes, because payable with exchange, which is fluctuating; whereas the general rule is, that a promissory note must be for a sum fixed and certain. No case was cited sustaining this position, and upon the slight examination we have given it, no case has fallen under our observation where the question was ever raised or decided. Though we find cases, as in *Gutacap vs. Woulwise*, 2 McLean, 581, where such instruments have been treated as promissory notes without question. And, although it might seem to be a slight modification of the general rule before stated, we have no doubt such instruments have everywhere been treated as commercial paper, both by the business world and by courts.

But even if they were not, strictly speaking, promissory notes, there can be no question that they are contracts for the payment of money only. Upon this there is no room for argument or doubt, and therefore the demurrer was clearly frivolous.

The judgment is affirmed with costs.

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STECKMESSER *vs.* GRAHAM, et al.

APPEAL FROM CIRCUIT COURT, DODGE COUNTY.

Heard July 18, 1859.] [Decided December 14, 1859.

Appeal—Judgment—Justice of the Peace—Venue.

S. obtained a judgment before a justice of the peace, against G. & S., from which they took an appeal to the Circuit Court; held that such appeal, under the Code, only stays the execution, and does not prevent S. from filing and docketing a transcript of the judgment, in the office of the Clerk of the Circuit Court, to create a lien on real estate.

Where a justice of the peace sent the appeal papers to the Circuit Court of Jefferson county, when they should have been sent to Dodge county; this does not deprive the appellant of the right to have them sent to the proper court; nor does he lose his appeal thereby.

This is an appeal brought by Steckmesser from an order of the Dodge Circuit Court, by which a transcript of a judgment rendered by Charles Beckman, Esq., a Justice of the Peace for the county of Dodge, in favor of Steckmesser, and against Graham & Scott, and which had been filed in the office of the Clerk of the Circuit Court of Dodge county, was ordered to be stricken from the files and the docket entries in the Judgment docket; which order was ordered to be vacated and set aside.

The order in this cause had been brought on by an order to show cause, based on an affidavit, which showed that the judgment was rendered April 13, 1857, for $58 21, and a transcript of the judgment was docketed January 19, 1858, in the Clerk's office, in Dodge county; that a transcript had also been docketed in Jefferson county, and an execution issued thereon, which the plaintiff was seeking to enforce; and that the defendants had appealed to the Circuit Court.

After the order for plaintiff to show cause, &c., was granted, the defendants obtained an order from the Judge, requiring the Justice to return to the Dodge Circuit Court all the papers in said suit, copy of docket, &c., or show cause, &c.; in answer to which the Justice returned: That he had sent the papers to the Circuit Court of Jefferson county; that the notice of

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appeal served on him did not state to what court defendants appealed, and that he supposed that the last named court had jurisdiction of the appeal, because he supposed that the ward for which he was elected had been annexed to Jefferson county. The justice also returned a transcript of his docket entries, and the entry of the judgment at first for $43 36, and then corrected, according to the desire of the defendants, to $58 21; and also notice of appeal, undertaking filed, costs paid, and appeal allowed. This appeal was dismissed from the Jefferson Circuit Court, September 22, 1858, for want of jurisdiction, and the order of dismissal filed with the justice.

Upon these papers, the Circuit Court of Dodge county struck the transcript of the judgment from the files of the court, and from the judgment docket; from which order this appeal is taken to this court.

Chas. R. Gill, for the appellant.

1. The circuit court had no power to set aside the transcript of the justice's judgment, and vacate the docket entries thereof, upon a mere motion. The judgment of the justice was valid and binding upon the parties until reversed. 1 Wend., 79; 2 Wend., 602; 4 Denio, 414; 14 John., 479; 19 Ib., 162.

2. Admitting the power of the circuit court to set aside transcript, &c., yet there was no occasion for it in this case. Even though an appeal were pending, it did not deprive Steckmesser of his right to file a transcript. R. S. of 1849, chap. 88, §§ 184 and 185. New R. S., chap. 120, § 170.

But there was not sufficient evidence furnished to show that defendants had perfected an appeal in such a legal manner as to stay proceedings on the judgment; on the contrary, it appears that they appealed to the wrong court, and it was dismissed for the want of jurisdiction. Again, if the appeal was perfected so as to stay proceedings on the judgment, the statute points out a different remedy from this, for staying or recalling an execution thereon. R. S., chap. 120, § 209.

J. J. Enos, for the respondents.

By the Court, PAINE, J. This is an appeal from an order of the circuit court of Dodge county, striking from the files a

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transcript of a justice's judgment, and vacating the docket entries thereon. It appears from the papers used in the court below, that an appeal was taken from the judgment of the justice, by the defendants, without, however, specifying to what court; and the justice, supposing that the ward in which he acted, had been attached to Jefferson county, by an act of the Legislature, which was afterwards held by this court not to have that effect, returned the papers to the circuit court of that county, where the appeal was afterwards dismissed. The plaintiff filed the certificate of dismissal with the justice, and obtained and filed the transcript, which was stricken off by the order appealed from. Upon this state of facts, we think the appeal from the justice was still in force. His sending the papers to the wrong court, ought not to deprive the party of the right to have them returned to the proper court, if his appeal was properly taken. And so the court below understood it; for in the order to show cause, it required the justice to make a return on the appeal to that court.

The question, then, is, whether, the appeal being in force, the plaintiff was entitled to obtain and file a transcript or not. Had this question occurred under the statutes of 1849, it might admit of some doubt. The party then was required to give security, in order to perfect the appeal; and being perfected, all proceedings on the judgment were suspended § 232, chap. 88, R. S. 1849. But the provisions of the code, under which this appeal was taken, contemplate, that an appeal does not, *per se*, stay proceedings on the judgment; but they provide for a "stay of execution," simply, by giving the requisite undertaking. § 258, 259, 260. The effect of these sections would seem, by a fair construction, to be only to stay the execution; and as there is nothing in this repugnant to the right of filing a transcript, as provided for in sec. 184, R. S. 1849, which was still in force, we think the party must

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be still held to have this right. It is true the debt would be otherwise secured by the undertaking staying the execution; but as the code implies the right to proceed on the judgment, notwithstanding an appeal, and provides that giving an undertaking shall stay execution only, we do not feel authorized to say that it shall have the further effect of depriving the party of his right to file a transcript. If it is desirable that it should have this effect, it is for the Legislature to provide for it. We think, therefore, the circuit court erred in the order appealed from.

It is suggested, in the respondent's brief, that the circuit court has control over such transcripts. That may be so, to a certain extent. They may undoubtedly strike them off, or vacate the entries made upon them, whenever a proper case is presented; but they have no such discretion in regard to it, that they may strike them off when the party has a legal right to have them remain.

It was also objected, that it appears from the docket entries of the justice, that he altered the judgment after entering it; but it appears from the entry, that it was done at the desire of the defendants, and they have filed no affidavit denying it. If this was so, even if the justice had no authority to make the alteration, they are estopped from objecting to it. And although it is undoubtedly true, as a general rule, that a justice has no authority to alter a judgment or record after having once made it, yet the authorities which establish it, assume that he might do it upon consent of the parties. *The People vs. Delaware*, 18 Wend., 558; *People vs. Lynde*, 8 Cow., 133. The record shows clearly enough, that this alteration was made after the entry of the judgment, and the date of it is a mere mistake, which does not affect the merits of the question.

The order appealed from is reversed, with costs.

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BOYD *vs.* SUMNER et al.

APPEAL FROM CIRCUIT COURT OF DODGE COUNTY.

Heard Nov. 11, 1859.] [Decided December 14, 1859.

Contract—Interest—Mortgage—Solicitor's Fees—Appeal.

Whether a contract to pay money on a given day, and which also provided that if the payments were not made on that day, then interest at 24 per cent. per annum, until paid, is legal interest and should be allowed. Quere.

If the principal debtor has acquiesced in a judgment to pay more than legal interest, a subsequent incumbrancer cannot complain of the judgment, unless he also shows that he has sustained injury thereby.

It is competent for parties to contract for a reasonable amount as solicitor's fees in the foreclosure of a mortgage, and such agreements will be enforced by the courts. In such case the court should refuse to tax a statute fee for the solicitor.

It is a general rule of the court to remand a case, for further proceedings, to the court below; but this rule will be changed upon the request of the parties, and for good cause shown.

Both parties to a judgment may appeal.

This action was commenced in the circuit court for Dodge county, on the 28th day of July, 1858, by the plaintiff, Thomas Boyd, for the foreclosure of four mortgages given by the defendant, Farnum A. Sumner, to the plaintiff. In and by one mortgage the mortgagor covenanted to pay thirty dollars solicitor's fees in case of foreclosure thereof; in another mortgage the mortgagor covenanted to pay the sum of twenty dollars solicitor's fees in case of foreclosure thereof; and in another mortgage the mortgagor covenanted to pay the sum of twenty dollars solicitor's fees, making seventy dollars solicitor's fees covenanted and agreed to be paid by the mortgagor, in case of foreclosure of the same. One of the mortgages was given to secure the payment of eight hundred dollars, with interest, according to the conditions of a money bond made by Farnum A. Sumner to the plaintiff, and bearing date on the 7th day of March, 1850, whereby Sumner bound himself in the penal sum of sixteen hundred dollars to pay the plaintiff the sum of eight hundred dollars in three years

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after the date of the bond, and interest thereon annually at the rate of twelve per cent. per annum, the first instalment of interest on the 7th day of March, 1850, and on the 7th day of March each year thereafter; and if the payments, or either of them, were not promptly made, on the day or days specified therefor, interest on the whole of the principal for the whole of the time until paid, at the rate of twenty-four per cent. instead of twelve per cent. per annum, until paid.

The defendants, the Bank of Milwaukee, Thompson Little and Courtland R. Baker, held subsequent mortgages made by Sumner on the same property, and defended against the recovery by the plaintiff of the twenty-four per cent. interest mentioned in said $800 bond; all the other defendants are subsequent incumbrances, and are all regularly in default.

At the special term of the circuit court on the 20th day of July, 1859, this cause was tried before his honor John E. Mann, judge of the third judicial circuit, when judgment was rendered for the plaintiff, from which both plaintiff and defendant, the Bank of Milwaukee, appeal; and for that purpose the bill of exceptions has been settled, which presents the questions raised by this appeal.

The plaintiff introduced as a witness Charles A. Eldridge, who being duly sworn did depose and say, among other things: There has been paid by defendant Sumner $500, as interest, but it was in my presence agreed between them that this $500 was not to be applied on the $800 bond and mortgage; that the $800 bond and mortgage by agreement between them was to remain, drawing 24 per cent. Sumner never declined to pay the 24 per cent.; 24 per cent. was not an uncommon rate at that time, but was almost a customary rate of interest. Mr. Sumner, through me, applied to plaintiff for further loans of money, and offered to pay that rate of interest. My recollections are that some of the mortgages subsequent to the $800 mortgage included interest due on some prior mortgages, but at every such time when interest was arranged on them it was expressly agreed between plaintiff and Sumner that no payment was to be applied on the $800 bond and mortgage, as the 24 per cent. which that was drawing was to remain, and was the consideration of its being allowed to run; the mortgage of $800 and its drawing interest at 24 per cent. was frequently spoken of between the parties, even up to about the time of the commencement of this action, and it was agreed between them that the 24 per

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cent. interest would compensate Mr. Boyd for letting the interest run. Sumner preferred to have it so, and never objected to it.

This was all the evidence offered by the parties.

The court finds the following facts: That the bonds and mortgages mentioned and described in the complaint in this action were made, executed and delivered as therein alleged and set forth; that there has been paid upon said bonds and mortgages, as interest, the sum of five hundred dollars, which, by the agreement between plaintiff and defendant, Sumner, was not to be applied on the bond and mortgage of eight hundred dollars; that the sum of twenty dollars was indorsed on the bond of ten hundred and thirty-eight dollars and seventy-one cents, as alleged, and that no further payment or payments have been made on said bonds; that the said mortgages contained covenants to pay seventy dollars solicitor's fees.

The conclusions of law are: That there is due from the defendant, Farnum A. Sumner, to the plaintiff, on the said bonds and mortgages set forth in the complaint, the sum of four thousand seven hundred and twenty-nine dollars and forty-five cents, for principal and interest, including interest on the bond of $800, dated March 7th, 1850, at the rate of twenty-four per cent. per annum from the date of said bond; that the sum of twenty-four per cent. interest mentioned in said bond is not a penalty, but is a lawful rate of interest agreed on between the plaintiff and defendant, Sumner; and that by the session law of 1859, amending sec. 41 of chap. 133 of the Revised Statutes, no more than $25 can be allowed as solicitor's fees, though more be agreed for in mortgage.

Judgment is therefore ordered for the plaintiff of four thousand seven hundred and twenty-nine dollars and forty-five cents.

Thereupon, afterwards, final judgment was entered in this action in open court, on the said 20th day of July, 1859, and the said solicitor's fees disallowed for want of legal power in the court to allow them.

The defendant, the Bank of Milwaukee, by its attorneys, Messrs. Smith & Ordway, excepted to the decision of this court as to and on matters of law which arose on such trial, and says that the court erred.

1. In deciding that the plaintiff was and is entitled to recover the whole twenty-four per cent. mentioned in the bond of eight hundred dollars.

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2. In ordering judgment for the plaintiff for the whole sum mentioned in said bond of $800, with twenty-four per cent. interest thereon from its date. And the plaintiff did also except to the judgment and decision of said circuit judge in relation to the said solicitor's fees, and says that the court erred in deciding that the law of 1859 prohibited the allowance of the solicitor's fees covenanted to be paid in said mortgage, and that the same ought to have been adjudged to and allowed the plaintiff, if the *amount* were proper and reasonable.

Both the defendant, the Bank of Milwaukee, and the plaintiff, appeal from said judgment by stipulation.

Chas. A. Eldridge, for the plaintiff.

The defendant, the Bank of Milwaukee, admits the making of the mortgage to the plaintiff, but insists that he is not entitled to the 24 per cent. on the $800 mortgage which is claimed. But it asks no relief, nor seeks to redeem the same, or to pay the amount due the plaintiff. Therefore, the Bank had neither a right to be heard in the courts, nor to appeal upon the point excepted to. It had shown no interest in the suit to entitle it to litigate in the matter. *Reid vs. Vanderheyden*, 5 Cow., 719; Code, § 232. Unless the answer be taken as proof, the appellant did not prove anything upon which the court could determine its interest, or that it had any. 3 Danl. Ch. Practice, 1604, and note 1. Supposing we admit the defendant was a mortgagee. It still does not appear that it has any interest, for it does not appear but that the premises are worth ten times enough to pay all, or but that the defendant will be paid.

2. If the appellant has made its interest appear so as to entitle it to be heard upon the point of its exception, then we submit that the allowance of the 24 per cent. interest is not error. The agreement to pay 24 per cent. interest was at the time it was made a valid agreement, and one which the parties might lawfully make. The agreement was made under the law. Revised Statutes of 1849, § 1, p. 264. "Any rate of interest agreed upon by parties in contract, specifying the same in writing, shall be legal and valid. Whatever the law was before this statute, under it parties might agree upon any rate of interest, provided only the contract was not fraudulent. 3 Car. & P., 240; Broom's Legal Maxims, 414–15–16 and 17; *Smith vs. Smith*, 4 Wend., 468; *Dakin vs. Williams*, 17 id., 448 and 454.

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3. But it is said that the 24 per cent. was intended not as a rate of interest in any event, but was inserted as a penalty for not paying the 12 per cent. when due. When the amount agreed upon is just and equitable, the court will not interfere. 2 Parsons on Cont., 428, 430–31; 1 J. C. R., 624; *Mowry vs. Bishop*, 5 Paige, 98; *Kennon vs. Dickens*, 1 Taylor, N. C., 231; Smith's Mercantile Law, 537; *Tallman vs. Truesdall*, 3 Wis., 154.

Nor is the fact that the penalty in the bond is less than the recovery, any objection to the amount allowed. Interest may be recovered beyond the penalty of the bond. 3 Caine 48; Story's Eq. Ju., § 1316.

Upon the appeal of the plaintiff on the exception to the decision of the judge disallowing the solicitor's fees stipulated for in the mortgage, there can be no doubt but the circuit judge was in error. He was anxious to allow the $70, but held that the statute of 1859 prohibited it. The propriety and justness of the amount in this case cannot be questioned. There are some sixty-six defendants, and the actual clerical labor could not be performed in the case for the amount allowed to be taxed and the sums stipulated in the mortgages. This court has also determined the right. *Truesdall vs. Tallman*, 3 Wis., 454.

Smith & Ordway, for the Bank of Milwaukee.

It is submitted that the plaintiff can only recover of the defendants the principal sum, with seven per cent. interest thereon from its date, March 7, 1850. The bond provides for the payment of annual interest at twelve per cent., and if not paid promptly, it then provides for twenty-four per cent. from date of bond, which, so far as chancery is concerned, is a void agreement; then there being no agreement in writing as to the rate of interest, it certainly draws but seven per cent. See 2 Dess., 170.

1. If this be not so, then the plaintiff can only recover the principal sum, with twelve per cent. interest from the date of the bond. Such is the condition, with only the addition that the interest shall be paid annually. If anything further is due or can be recovered, it must be by reason of failure to pay the twelve per cent. when due; this would be strictly a forfeiture; as a penalty for failure to pay twelve per cent. annually, or the principal at the end of three years, the defendant incurs the forfeiture of twelve per cent. additional from the date of the bond; although this may not be a *void* agreement to all

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intents and purposes, yet in this jurisdiction, a court of equity, it must at least be considered as surplusage, leaving the agreement to pay twelve per cent. per annum in force, because a court of equity does not assist the recovery of a penalty or forfeiture, or anything in the nature of one. *Livingston vs. Tompkins*, 4 J. C. R., 431; Story's Eq. Juris., § 1319; *Bank of Michigan vs. Hammond*, 1 Douglas, 527; *Hall vs. Delaplaine*, 5 Wis., 207.

2. This stipulation to pay twenty-four per cent. is a penalty only. Story's Eq. Juris., §§ 1321, 1322, 1323; Adams' Eq., 252, 253, 254; *Dennis vs. Cummins*, 3 John. Cases, 297, notes a, b; *Seaton vs. Slade*, 7 Ves., 274; *Sloman vs. Walter*, Lead. Cas. in Eq., 459, *et seq.*; *Burton's Case*, 5 Co., 69; 2 Parsons on Cont., 436, note to *Barton vs. Glover*, Holt's N. P., 43–45; see note B. to *Spencer vs. Tilden*, 5 Cow., 151.

The Bank of Milwaukee is not the complainant in this action, seeking relief from this forfeiture; an entirely different rule prevails in such a case; but the question is not, "Is the defendant entitled to relief?" but, is "What is the plaintiff by his contract entitled to recover?" We think the bank was not called upon to answer, setting up a defense so called; that it might have raised this question on the plaintiff's complaint alone.

3. The plaintiff could not recover the twenty-four per cent. without alleging and proving a demand of the twelve per cent. when due, at the end of the first or second year, or of the principal sum and twelve per cent., at the end of the third year.

"The proceeding being at common law, and the claim of the plaintiff being *stricti juris*, all the niceties required by common law must be previously complied with, &c, to entitle the plaintiff to recover. See *Jackson vs. Harrison*, 17 John., 69. The defendant, in a case of this description, has a right to remain passive, and to avail himself of any defect of proof on the other side necessary to establish his right to recover." *Remsen vs. Conklin*, 18 John., 450. So in this case, to entitle the plaintiff to recover the twenty-four per cent., he must allege and prove the demand. On the contrary, no demand is alleged or proved, and the testimony shows directly that none was made; thereby the right to declare the forfeiture was waived. The plaintiff seems to have taken it for granted, that, on account of the non-payment of the twelve per cent., he could recover the twenty-four. If we can gath-

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er anything from the testimony of Mr. Eldredge, "it was agreed between them that twenty-four per cent. would compensate Mr. Boyd for letting the interest run," it is, that compound interest should be secured under this agreement; this seems to have been an after thought, and must have grown up long after the execution of the bond; but whether it was an original or after thought, is immaterial, because courts will not lend their aid to enforce compound interest. *The State of Connecticut vs. Jackson*, 1 J. C. R., 13; *Hastings vs. Wiswall*, 8 Mass., 455; *Mowry vs. Bishop*, 5 Paige, 98; *Van Benschooten vs. Lawson*, 6 J. C. R., 314.

By the Court, PAINE, J. We do not deem it necessary in this case, to decide whether the provisions in the $800 bond and mortgage, in relation to the payment of 24 per cent. in case of non-payment at the time provided, should be regarded as in the nature of a penalty, or as a valid contract for interest. The twenty-four per cent. was allowed by the court below as interest. But there is nothing in the case that shows, even if this was an error, that the bank was aggrieved by it. It seems no proof at all was offered of the interest of the bank in the mortgaged premises, except what is furnished by its answer. And even if it is assumed that its interest is as therein set forth, there is nothing to show that the premises are not amply sufficient to pay off its incumbrance, after satisfying the judgment of the plaintiff as rendered. Sumner acquiesces in it, and the bank has no right to contest the question without showing that it is, or may be aggrieved by the judgment as it stands. For if the premises are still sufficient to pay the bank, it has not been aggrieved, and has no interest in the question, whether the 24 per cent. should be considered a penalty or valid interest.

We think that part of the judgment, which disallows all solicitors' fees over $25. and from which the plaintiff appealed, must be reversed. There were several mortgages foreclosed in the suit, and the amount of solicitor's fees stipula-

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ted to be paid in all of them, was $70. The court below thought no more than $25 could be allowed, because it was forbidden by chap. 200, Session Laws of 1859. But we think that chapter, as well as the section of the Revised Statutes, of which it is amendatory, refers only to such costs and fees as may be taxed by the authority of the statutes, independent of any stipulation of the parties upon the subject. It is well known that parties are obliged to pay attorneys more than these taxable costs in order to obtain their services, and from this has arisen the practice of stipulating in regard to it, in their agreements. And in *Truesdell vs. Tallman*, 3 Wis., 454, this court has already decided that such stipulations, when made in good faith and for reasonable amounts, should be enforced. There were a very large number of defendants in this suit, and several mortgages foreclosed; and, in view of these facts, it cannot be said that $70 would be an unreable amount.

In such cases, where the parties by their agreement provide for a reasonable amount for the entire fees of a solicitor, it would probably be within the discretion of the court below to refuse to tax the amount fixed by statute. That part of the judgment appealed from by the bank is affirmed with costs That part appealed from by the plaintiff is reversed with costs.

And as the parties desired that final judgment might be entered here in consequence of the situation of the premises, and the length of time before the next term of the circuit, although the late practice in this court has been different, the judgment may be entered here accordingly, though as a general rule, we shall adhere to the practice of remanding to the circuit court for such further proceedings as may be necessary

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SAVAGE *vs.* SUPERVISORS OF CRAWFORD COUNTY.

APPEAL FROM CIRCUIT COURT, CRAWFORD COUNTY.

Heard July 23, 1859.] [Decided December 14, 1859.

County Orders—Counties.

A suit may be maintained against a county, upon a county order, after it has been presented to the treasurer of the county, and payment refused. Such an action is provided for by express statute, and gives the judgment creditor a decided advantage over other creditors, or county order holders.

The plaintiff in his complaint claimed to recover upon fourteen county orders, issued by the supervisors of the county, at various times, from the 27th day of November, A. D. 1849, to the 27th day of December, A. D. 1858; that the orders were severally presented for payment to the treasurer of the county, on the 20th day of April, A. D. 1859, and payment refused, and notice to defendant; plaintiff demanded judgment for amount of the orders.

This complaint the defendant answered, denying each and every allegation, matter, fact and thing in the complaint contained.

Upon this issue this cause came on to be tried before the court, at the May term, A. D. 1859, a jury having been waived. Upon the trial the plaintiff, to maintain and prove the issue on his part, introduced, in evidence, a certain county order, in the words and figures following:

$11 06.

No. 177. To the treasurer of Crawford county.

Pay to Henry W. Savage, or bearer, the sum of eleven dollars, six cents, out of any money in the treasury not otherwise appropriated.

[SEAL.] A. BRUNSON, Chairman.

Prairie du Chien, Nov. 27, 1849.

Attest, HEMAN BALDWIN, Clerk Board Co. Supervisors, Crawford County, Wisconsin.

Upon the back of the order was the following:

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"Presented for payment, and payment refused, for want of funds in the treasury.

"I. P. PERRET GENTIL, County Treasurer.

"April 20th, 1859."

The plaintiff introduced thirteen other orders, all of the form tenor and effect of the county order above set forth, except as to the dates, amounts, and numbers, which corresponded with allegations in the complaint, and together amounted to the sum of $405 80.

And it was stipulated and agreed between the parties, that the orders were duly issued by the proper constituted authorities of the county, and the same were presented to the proper county treasurer, as appears upon the back of the orders, and that the orders were not paid, for want of funds in the county treasury, and that the same were the property of the plaintiff.

And the court did then and there find and adjudge as follows:

1. That the county orders sued on were issued by the proper constituted authorities of the county.

2. That said orders were presented to the treasurer of Crawford county, and payment demanded of said treasurer, on the 20th day of April, 1859, and payment refused, for want of funds in the treasury.

3. That there is now due to the said plaintif the sum of four hundred and five dollars and eighty cents, the amount due upon the face of said orders. And the court thereupon rendered judgment for said plaintiff, and against said defendant, for the sum of four hundred and five dollars and eighty cents, and cost of suit.

From that judgment the defendant appealed to this court.

Chas. Dunn and *O. B. Thomas*, for appellants.

1. The county orders upon which this action is brought, are a county charge, the Board of Supervisors not having authority by law to issue orders, except in settlement of charges against the county; and when so issued, the county is under legal obligation to pay the same. R. S., chap. 13, § 27, sub. 2; id., § 129.

2. No action can be maintained against a county or the Board of Supervisors, for the recovery of a county charge. 2 San., 460; 4 Barb., 64; 12 Conn., 404.

3. It is the duty of the Board of Supervisors to direct the raising of such sums of money as may be necessary to defray

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the county charges and expenses, and all necessary charges incident to, or arising from the execution of their lawful authority. R. S., chap. 13, sec. 27, sub. 5, p. 150.

4. It being conceded in this case that there was no money in the county treasury with which to pay these orders, at the time they were presented, a mandamus should have issued to the Board of Supervisors, to compel them to raise by taxation a sum sufficient for that purpose; and a mandamus will not lie where there is a legal remedy. 10 Wend., 363; 2 Cow., 444; 1 Wen., 325; 2 Hill, 45.

Bull & King, for the respondent.

The judgment in this case is right, the plaintiff having failed to make the orders available in satisfaction of an original claim against the county; he should be entitled to a right of action against the county. The supervisors of a county are the representatives of the county authorized by law to examine, settle and allow all charges against the county, and when settled to issue county orders therefor. The drafts were not paid, for want of funds. In such a case can there be a doubt that the county is liable on the contracts made by its authorized agents, in business specially committed to them by statue? And being liable, that liability is to be enforced by a suit against the Board of Supervisors of the county, the name by which a county must be sued. Otherwise, a person who has a claim against a county, is without remedy. *Paddock vs. Symonds*, 11 Barb., 117; *Chemung Canal Bank vs. The Board of Supervisors of Chemung County*, 5 Den., 517; *Crawford County vs. Wilson*, 2 Eng., 214; Rev. Stat. Wis., chap. 13, § 42.

A judgment against the county might, and likely would, place the plaintiff in a much better condition to collect his claim against the county.

By the Court, Cole, J. The single question arising in this case is, whether an action can be maintained against the supervisors of a county, upon a county order, duly issued, after the same has been presented to the treasurer of the county, and payment thereof has been refused, for want of funds in the county treasury. The general capacity of a county to be

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sued upon a claim against it, was not questioned on the argument, neither could it well be, in view of sec. 2, chap. 13, R. S., 1859, which declares that each organized county in the State shall be a body politic and corporate, and as such competent to sue and to be sued, &c. Nor is it objected that this action is not in conformity to section 19, of the same chapter, which prescribes the name or manner in which a county can be sued. Conceding that a county, by the laws of this State, is a *quasi* corporation, erected for the purposes of local government, with certain defined powers, capable of being sued, in the manner adopted in this case, on a proper claim; still, it is insisted by the counsel for the county, that no action can be maintained upon a county order. No express provision of law is relied upon in support of this position, as prohibiting a suit from being brought upon a county order; but certain considerations of inconvenience and public policy are suggested, for the purpose of showing that an action ought not to be given on such a liability; and it is said that if an action can be maintained upon a county order, that then in the present embarrassed condition of the finances of many of the counties in the State, and the quantity of unredeemed county orders now in circulation in them, innumerable suits may be instituted upon these orders, and judgments recovered, with costs; thus greatly increasing the burdens of the tax payers, by these unnecessary legal proceedings. It is not to be denied, that there is very great force in these considerations; and were we at liberty to give a decision to advance that line of policy which would best subserve the interests of the tax payers of the counties, and promote the public good, it is quite probable that we should hold that no action would lie upon a county order. But it is obvious that these considerations of expediency can have no weight with courts, when the law is clear. It is equally evident, we think, that, under our statute, a county order is a claim or evidence of a county liability, cre-

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ated by a competent authority, and may be the ground of an action against the county. In the clearest manner, the county Board of Supervisors are authorized to examine, settle and allow all accounts chargable against the county, and when so settled, may issue county orders therefor, as provided by law. § 27, chap. 13, subdivision 2. The Board are required not to issue, in any one year, a greater amount of county orders than the amount of county tax levied in such county for such year. It is undoubtedly true, that a disregard of this wholesome restriction upon the county boards to issue these orders, has often proved to be very detrimental to the best interests of the counties; but upon the question as to whether an action can be maintained upon a county order, the following section of the chapter determines it conclusively in the affirmative. Section forty-two reads as follows: "No action shall hereafter be maintained by any person against a county, upon any claim or demand, *other than a county order*, until such person shall first have presented his claim to the board of supervisors of such county, for allowance." This language is certain and precise, and clearly conveys the intention of the legislature. That intention was to impose a restraint on the commencement of suits against the county upon a claim, before the same had been presented to the county board for allowance. The county board is the proper authority to settle and allow the claim; and the right to bring a suit against the county is not complete until the claim has been presented to the board, for allowance. Hence the language: "no action shall hereafter be maintained, by any person, against a county, upon any claim, until, &c. But notice the exception, "upon any claim or demand, *other than a county order*;" as though the section had read, that no action shall be maintained by any person against a county, upon a claim, until it shall be presented to the county board for allowance, provided that this shall not apply to a county order, upon which an action may

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be maintained, without being first presented to the board, for allowance; thus by the strongest implication recognizing the right to maintain the action, when founded upon a county order, without any restriction whatever; but when the suit was instituted upon any other claim imposing the condition that it shall first be presented to the board for allowance, before the action can be maintained. We are unable to perceive how any other construction can fairly be placed upon this section. The plain, obvious idea conveyed by the language used, seems to be what we have above stated. Should this interpretation of the law lead to injurious consequences, the remedy is with the legislature, by amending the statute, and not with the courts, whose duty it is to construe the enactment by the language it contains.

We were referred to some cases, by the counsel for the appellant, to show that no action could be maintained against a county, upon a claim against the same. The answer to this is, that our statute expressly declares otherwise. So, such cases as that of *Wood et al. vs. The County of Hartford*, 12 Conn., 404, do not apply; and as little applicable to the case under review, is the doctrine laid down in *Brady vs. Supervisors of New York*, 2 Sand. Sup. Ct., 460. In the latter case, an action was brought upon a claim for services rendered by counsel for the Board of Supervisors, without submitting the claim to the Board, to be settled and allowed. The court held that the action would not lie. See the case of *Lyell vs. The Supervisors of Lapier County*, 6 McLean, 446, where the court decided that an action could be maintained upon a county order, in the United States Court, when the sum in controversy, and the character of the parties, gave the court jurisdiction.

It was contended, that since, in this case there was no money in the county treasury, with which to pay the orders sued upon, the respondent's remedy was by mandamus to

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compel the county board of supervisors to raise by taxation a sum sufficient to pay them. Whether a writ of mandamus would lie under such circumstances, admits of some doubt; but it is not necessary to decide the point in this case. As a general rule, a party will not be entitled to a writ of mandamus when he has any other legal remedy; and if our view of the statute be correct, he may bring his action upon the county order, and recover judgment. As an argument to show that the action would not lie upon the order, it was suggested that when a party obtained his judgment, he was not in a much better position, so far as obtaining his money was concerned, than when he held the order. But this is a mistake, as section 24 gives a party obtaining a judgment against a county, a decided advantage over one holding a county order. In a certain contingency, he can have execution upon his judgment.

We think these observations sufficiently dispose of the questions in this case. The judgment of the Circuit Court is affirmed.

ROGERS *vs.* BRIGHTMAN et al.

APPEAL FROM CIRCUIT COURT, BAD AX COUNTY.

Heard July 22, 1859.] [Decided December 14, 1859.

Statute of Frauds—Partnership—Contract.

In an action commenced by a surviving partner, it is not competent for the defendant to prove by his own oath, what the contract made with the deceased partner was. As to the survivor the deceased stands in the relation of a deceased agent.

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It is improper for the court to refuse to instruct the jury in relation to a verbal contract, "that if they believed that no time was ever agreed upon between the parties for the completion of a contract, then the statute of frauds did not apply." And this error will not be cured, though the court in its charge do instruct properly in the law, unless it also appear that the refusal did not prejudice the party asking the instruction.

A contract to be within our statute of frauds, must show by its *terms* that it is not to be performed within the year, and it is not enough to show that by mere possibility it might not be.

This action was commenced in Crawford county, and from thence removed to Bad Ax county for trial. It was commenced by Rogers as surviver of Tuttle& Rogers, and averred that Myron Tuttle in his lifetime, and the plaintiff, were possessed of about three thousand pine saw logs in the Kickapoo river, near Brightman's mill, and of the value of $5,000, and that the defendants wrongfully detained the same, &c. The defendants answered, confessing the partnership; that Tuttle in his lifetime had the logs in the Kickapoo river, and of the value of $5,000; but denied the ownership of this plaintiff. They also admitted their possession, but denied the detention, because, during the summer of 1856, Brightman agreed with Tuttle to saw these logs into lumber for him at $5 per 1000 feet; that Tuttle, in September or October, 1856, delivered the logs to Brightman; that the defendants commenced sawing the logs into lumber in pursuance of the contract, and continued to do so with due diligence till April, 1857; that then Tuttle made another agreement with them to saw the remaining logs, 4,300, for $5 per 1000 feet, and to sell the lumber and to account for the proceeds, after deducting the $5 per 1000 feet; that they had partly performed this contract by sawing 1,700 logs, and are still ready to perform the balance thereof; and that there were due them $1,500 upon the contract, and they claimed the right to complete the contract according to its terms; and therefore they demanded possession of the property. To this the plaintiff replied generally.

On the trial the plaintiff proved by himself, that he was the copartner of Tuttle, and owned the half of the logs by virtue of the partnership. He and the administrator of Tuttle had offered to settle with the defendants for what logs they had

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sawed, but they refused and claimed to hold the logs and saw them out under the contract with Tuttle. He then offered to sell them the logs, and they refused to buy them. He then sent men after the logs, and the defendants said that they could not have them. He admitted that the defendants were to saw the logs, as he understood, and to sell the lumber at $5 per 1000, but did not understand that any particular price was agreed upon. The logs were all delivered to the mill at one time. He also confessed the genuineness of a large number of orders drawn on the defendants by Tuttle & Rogers for lumber, and also the receipt of 44 cribs of lumber taken by Tuttle & Rogers, and 15 cribs taken by them at Millville. These last contained 48,000 feet. He estimated the logs would make 1,294,000 feet. Other witnesses testified to the same facts; and the plaintiff rested his case.

The defendants then moved the court to non-suit the plaintiff, which was refused and excepted to.

The defendant Brightman then testified to the partnership of the defendants.

The defendants' counsel then offered to prove the contract between Tuttle, deceased, and Brightman, and the subsequent contract between Tuttle and both the defendants, as the contracts are set forth in defendants' answer, by the testimony of the defendant, Brightman. The counsel for the plaintiff objected, and the court sustained the objection, and ruled out the offer of evidence to which the counsel for defendants excepted.

He then testified to the delivery of the logs, and the sawing of a part; and also that they sawed 95,585 feet, which, with culls not measured, amounted to $1,070 06; that they had paid the orders of Tuttle & Rogers, 13,554 feet, and had used 32,-658 feet, and $12 worth of cullings. That they had delivered to Tuttle & Rogers 130 cribs of lumber. He testified that the plaintiff and Tuttle's administrator had requested a settlement, &c., but he had refused because he considered his contract better for himself, which he insisted upon. They had forbidden the men sent after the logs to take them out of the pond, and that they would resist them by force if necessary.

The counsel for the defendant then offered to prove by Brightman that the late firm of Tuttle & Rogers was indebted an amount for work and labor, and for goods sold and deliv-

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ered, and for money laid out and expended for their use besides what they owed them for sawing, upon general account, and insisted that defendants had a right to apply a portion of the money received on sales of lumber, in liquidation of such indebtedness; but the court ruled that such proof was inadmissible and excluded the same from the jury, to which ruling defendants' counsel excepted.

The defendants proved by other witnesses, that Tuttle had said that they were to give $5 per 1000 feet for sawing the logs, and that they were always ready to meet all demands for lumber at call, since they had began to saw. The contract was verbal. And under the customary manner of sawing, it would have taken the greater part of two years to saw the logs.

The counsel for the defendants requested the court to instruct the jury as follows: "If the jury find that the logs in controversy were held by the defendants under a valid contract to saw the whole of said logs, and that the defendants have entered upon a part performance thereof, that then and in that case, the defendants are entitled to recover of the plaintiff the damages they have sustained by reason of the taking of the logs from the defendants, and that the proper measure of damages, is the actual loss by them proved to have been sustained by the reason of the taking of the property, and seven per cent. interest upon the amount of capital thrown out of employment by the taking of the logs." The court refused this instruction, and the defendants' counsel excepted to such refusal.

The defendants' counsel further requested the court to instruct the jury "that this contract in order to be void under the statute of frauds, must have contained some provision which amounted to a *prohibition* of the completion of the contract within one year, and that the mere understanding that the contract might occupy more than one year in its performance, does not bring it within the statute. For instance, when a party undertakes to build and finish a house, the whole to be done before the close of fifteen months, or five years, if you please, from the date of the contract, such contract is not within the statute because the party is at liberty to complete the undertaking in one year if he chooses." The court refused this instruction, and the defendants' counsel excepted to such refusal.

The defendants' counsel further requested the court to in-

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struct the jury "that if they believed that no time was ever agreed upon between the parties for the completion of this contract, then the statute of frauds does not apply, and the contract is valid." The court refused this instruction, and the defendants' counsel excepted to such refusal.

The defendant's counsel further requested the court to instruct the jury as follows: "If the jury find that the defendants were at liberty to pay themselves from the sales of lumber as fast as they sawed or could sell the lumber, then the contract is not bad but valid under the statute of frauds." The court refused this instruction, and the defendants' counsel excepted to such refusal.

The court charged the jury that "if it appeared to have been the intention of the parties to the contract claimed by the defendants at the time of the negotiations about sawing the logs to reduce the same to writing at some future time, such contract was not *completed* until it was reduced to writing." To which ruling and opinion the defendants' counsel excepted.

The court further charged the jury as follows: "If the jury find that the defendants were to have their pay out of the proceeds of the lumber sawed, they can have no lien upon the logs not sawed." To which ruling and opinion the defendants' counsel excepted.

The court further charged the jury that under the answer of the defendants they (the defendants), can have no lien upon the *logs not sawed* for their services. To which ruling and opinion the defendants' counsel excepted.

The court further instructed and charged the jury as follows: "The defendants set up the contract for sawing the logs in their answer as follows: 'These defendants further answering say, that some time in April, in the year 1857, the said Myron Tuttle agreed with these defendants, who were then co-partners, to saw the balance of said logs then remaining, being about 4,300 logs, for $5 per 1,000 feet, these defendants to be at the expense of butting the logs and attending the lumber yard—to sell the lumber and to account to the said Tuttle for the proceeds thereof, after deducting the said five dollars per 1,000 feet for sawing the same as aforesaid.' I understand that this contract requires that the defendants must do more than saw the logs before they are entitled to the five dollars per 1,000 feet. They must open a lumber yard, sell the lumber, also butt off the logs. The defendants

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cannot saw the logs, and then demand the cash for the sawing. They must sell the lumber and deduct the five dollars per 1,000 feet out of the proceeds of the sale. The defendants must also account for the proceeds of the sale from time to to time, on a reasonable demand after the sale of the lumber sold. If they refuse to so account, the plaintiff may refuse to have the balance of the logs sawed, and demand and take them away, as he is not obliged to wait until the defendants have converted the whole to their own use. The alleged contract does not, in its terms, say at what time the logs were to be sawed, but I instruct you that, in that case, the law required them to be sawed in a reasonable time under all the circumstances. If the defendants have not sawed them within a reasonable time after their delivery, the plaintiff might demand and take away the balance of the logs not then sawed. He is not obliged to wait five years to have them sawed and lose the chance of an early sale of the lumber. To which opinion and ruling the defendants' counsel excepted.

The court further instructed and charged the jury as follows: "The defendants claim that there is a balance due them for sawing, and that they have a lien on the logs unsawed for that balance. If there is a balance not paid by reason of the non-sale of lumber sawed, I instruct you that the defendants have a lien upon the unsold lumber, but not upon the logs not sawed." To which opinion and ruling of the court the defendants' counsel excepted.

The bill of exceptions further contains the following rulings which were by the court given in charge to the jury and not excepted to by defendants' counsel: "That if the agreement for sawing the logs was merely for the rate of compensation by the thousand feet, and not for the entire quantity, the plaintiff could terminate the same at any time. That the defendants have no lien upon the logs claimed for damages for the breach of any contract. That if it was the understanding of the parties that the defendants should keep the account of sawing and sales, it imposed upon them the obligation to exhibit their accounts whenever called upon, and their refusal was a breach of the contract, and justified the plaintiff in rescinding and requiring a return of the property remaining on hand. If the jury find that the defendants held the logs under a valid contract to saw the whole quantity of logs, that then and in that case they should find for the defendants. If the jury find that these logs were all of

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them delivered at one time and place, to be sawed at a specified price per thousand feet, and that the defendants always acted as if they expected to saw the whole lot, these circumstances may be considered by the jury in determining whether the agreement for sawing the logs was an entire contract or not. That this contract is not bad under the statute of frauds for not being in writing, unless by its express terms it was not to be performed within one year. That if the jury find that the defendants, up to the time of the commencement of this action, fulfilled their part of the contract of sawing as fast as the plaintiff desired or requested them to saw, then the plaintiff was not at liberty to rescind the contract without the consent of the defendants and it is still in force. If the defendant have accounted fairly for the sales of lumber made by them, it makes no difference what amount of lumber remains unsold, nobody is here called upon to account for such unsold lumber."

The verdict was for the plaintiff, and found the title to the property to be in him, that the defendants wrongfully detained the same, and assessed the plaintiffs's damages for the detention thereof at ten cents; and judgment was accordingly then and there entered for the plaintiff and against the defendants for the return of said property to the plaintiff, and for said damages and costs of suit; from which judgment the appellants appeal to this court.

W. H. Tucker, and *Johnson & Bullock*, for appellants.

1. The court erred in overruling the motion made by the defendant for a nonsuit. Revised Statutes, 733.

2. The court erred in ruling and deciding that the witness Brightman could not testify to the contract made between Tuttle and the defendant. Rev. Stat., 808, §§ 50 and 51.

3. The court erred in ruling out the testimony offered to show the indebtedness of Tuttle & Rogers to the defendants. The defendants had a right to pay themselves any indebtedness due from Tuttle & Rogers out of the proceeds arising from the sale of lumber, &c. 19 Conn., 190; 5 Denio, 470; 5 Gilman, 449; 11 Met., 174; 3 Denio, 284; 7 How., 681.

4. The court erred in refusing to give the first special instruction asked for by the defendants. That instruction contained a correct statement of the rule of damages on the case. Sedgwick on Measure of Damages, 215-228, also, 28, 29 and 30; 7 Pickering, 181; 7 Wend., 123; 10 Mas., 459.

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5. The court erred in refusing to give the 2d, 3d and 4th special instruction asked for by the defendants. The contract was clearly not within the statute of frauds. 8 B. Monroe, 422; 2 Sand. Ch., 91; 3 Strobh, 196; 1 Kelley, 148; 3 Hill, 128; 5 Hill, 200; 10 John., 244; 15 Wend., 336.

6. The court erred in that part of its charge excepted to.

Hutchinson & Merrill, for respondent.

By the Court, PAINE, J. This action was brought by the plaintiff as surviving partner of the firm of Tuttle & Rogers, to recover possession of a quantity of logs. The defense set up was that the defendants had possession of the logs under a contract made with Tuttle, the deceased partner, by which he delivered to them about five thousand logs at at their mill, which they were to manufacture into lumber, sell and pay themselves out of the proceeds, at the rate of $5 per 1000 feet, for sawing.

The parties were both sworn, and when one of the defendants was examined, his counsel sought to prove by him the contract as actually made with Tuttle. This was objected to, and the evidence rejected, on the ground that under sec. 51, chap. 137, R. S., 1858, which allows parties to be witnesses, they are yet not allowed to testify as to any transaction conducted by an agent of the opposite party, unless the agent is still living. This ruling was excepted to, but we think it correct. Each partner is to all intents and purposes an agent of the firm, and of the other partners, as to matters within the scope of the partnership business. And where a contract is made by one partner for the firm, we think, after his decease, a contest between the survivor and the other parties in relation to it, is a case not only within the spirit but within the letter of this provision of the statute. Its object was to allow the parties to testify to such matters, as to which they stood upon an equality, in each being able to produce the testimony

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of the person actually conducting the business, but to exclude them where this equality had ceased to exist.

A number of other exceptions were taken which we do not deem it necessary to notice, as we think the judgment must be reversed for the following reasons: It appears from the case that the principal contest both as to law and fact, in the court below, was, whether the contract set up by the defendants was within the statute of frauds or not. And we have found some difficulty in disposing of the exceptions upon this point, in view of the partially conflicting ruling of the court below in regard to it. The second instruction asked by the defendant's counsel was refused. The only doubt we have as to the correctness of this instruction is upon that clause which says that in order to be within the statute, the contract must contain some provision which "amounts to a prohibition" of its completion within the year. If the instruction had said it must contain a "prohibition, it would have been properly refused, because that would imply an actual prohibition in terms. And this is not necessary; as if it appears by the terms of the contract that it cannot in the nature of things be performed within the year, it is within the statute, though it contains no express prohibition. But there may be room for doubt whether the provisions of such a contract would not "amount to a prohibition, or be equivalent to one so far as their effect was concerned. But, conceding that for this inaccuracy the instruction was properly refused, we think the next should have been given.

In this the court was asked to instruct the jury "that if they believed that no time was ever agreed upon between the parties for the completion of this contract, then the statute of frauds did not apply." This the court refused, but in its general charge stated the law correctly to the jury, and told them the contract was not bad under the statute for not being in writing, unless by its express terms it was not to be performed

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within one year. We regard this, therefore, as a case where the court refused a proper instruction upon the point, and yet stated the law correctly in its general charge. Should the judgment be reversed for that reason? We think it should; unless it clearly appears that the refusal did not, or could not prejudice the rights of the party. And upon looking into the evidence to see whether that appears, we think it does not; but that, on the contrary, it appears that the defendants must have been prejudiced by it; and that the jury must have found that the contract was within the statute and void. We think this must have been so, for the reason that there was no material conflict in the evidence, as to the actual making of the verbal contract. A number of witnesses testify to admissions by Tuttle in his lifetime that he had made a contract with the defendants to saw the logs he had delivered to them. All the evidence in the case goes to show that they were delivered under some contract in regard to their sawing. And the plaintiff himself in his testimony, folio 16 of the printed case, admits that he had understood the contract to be substantially as set up by the defendants, except that he did not understand that any particular amount of sawing was agreed on. But he admits that all the logs delivered to defendants were delivered at one time; and we see nothing in the evidence tending to raise any question, but that whatever contract was made, related to all the logs delivered. And if this was so, the defendants were rightly in possession for the purpose of performing their contract, unless it was void within the statute.

And assuming it to be as stated by all the witnesses who testified in regard to it, and as admitted by the plaintiff, that he understood it, we think it was not. It is true, that the evidence of the defendants themselves showed that the logs could not all have been sawed by their mill, within one year from the time the contract was made. And it is also probable

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that the parties contemplated that they would be sawed at that mill. But this is not the question presented by the statute. That is, whether, by the *terms* of the contract, it is not to be performed in the year. The only contract shown here, or which any of the evidence tends to show, is, that the defendants were to saw the logs, sell the lumber, and pay themselves out of the proceeds. Now, we think, in order to make a contract void within this clause of the statute, it must be such that when its terms are known to the court, it can say from them, that it could not be performed within the year. And if this cannot be done, but it appears that everything provided for by the contract, may, in the nature of things and without any violation of its provisions, be done within the year, it cannot then be avoided by an outside inquiry to show that by the means and course of performance which the parties contemplated using, it would necessarily occupy a longer time. The authorities even go further than this, and hold, in many cases, that even where it appears from the terms of the contract that the parties clearly intended it to continue longer than a year, yet if by any possibility, as by the death of one of the parties, it may be completed within the year, it is not within the statute. Thus an agreement to educate a child, *Ellicott vs. Turner*, 4 Maryland, 476, and an agreement to support a child eleven years old till she is eighteen, 19 Pick, 365, have been held not within the statute, because the child might die within the year, and thus put an end to the agreement. And yet it is clear from the terms, that the parties contemplated that the contracts were not to be performed within the year. And in the last case, it might admit of question whether, if the child had died within the year, it could be strictly said to have been a performance of an agreement to support her for seven years, or whether it would not rather have been a case where the performance became impossible by the act of God; and so the party was released. But be that as it

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may, these and many other cases that might be cited, go to show that the evident intent and contemplation of the parties, that the contract would not be completed in the year, do not bring it necessarily within the statute, if it possibly may be, without any violation of the ordinary course of nature.

The cases have undoubtedly gone a great ways in relieving parties from the operation of the statute. The course of decision upon this act presents the most striking example of the liberties courts have taken with positive statutes, which exists. But great excuse may be found in the inherent difficulty of establishing any exact interpretation which shall be applicable in all cases, and in the temptation to hold it inapplicable upon slight grounds, growing out of the hardship in many instances, of applying it.

There is a difference in one or two particulars between our statute and the English statute of frauds. Ours makes the agreement void; that simply provided that no action should be maintained on it. That includes agreements "not to be" performed within a year; ours, agreements that "*by the terms*," are not to be performed within a year. And we think it a sound construction to say, that in order to bring a case within this clause of our statute, the court must be able to see from its terms, that the performance is not to be completed within the year, or what is the same thing, that it cannot, in the nature of things, be done. We think this rule in harmony with the statute, and that it is much more certain in its application than that of pursuing the inquiry into the probable means and modes of performance contemplated by the parties, and then into the possibility or impossibility, according to those means and modes, of completing the contract within the year. The later rule must, in many cases, open inquiries of so vague and uncertain a character, as to make it impossible to arrive at any accurate result. Suppose a contract

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with an artizan to manufacture a quantity of articles personally, which, by his own labor at the ordinary mode of working, he could not finish in a year, but by extraordinary industry he could, would it be within or without the statute? Would the party not be at liberty to be unusually industrious if he chose? And if by being so he could complete his contract, should he be deprived of it, because at the ordinary rate he would have worked more than a year? It would seem not. And yet, an inquiry into the various degrees of diligence that might be used, and the possibilities resulting therefrom, would seem too uncertain as a practical criterion of the legality of a contract. Or, suppose a contract with a man to manufacture a quantity of articles which, with the workmen he then has, he cannot possibly finish in the year, but might by employing others, but nothing is said in the contract upon this point; shall there then be an inquiry whether the parties contemplated that only those then employed should work, or that others should be employed, and the contract be held good or bad accordingly? This would seem too uncertain for practical purposes.

Applying therefore the rule above stated to this case, there was nothing in the terms of this contract, which showed that it was not to be performed in the year, nothing in its nature that showed that it could not be. It might have been impossible for the defendants to complete it with the means they then had of working, but they might have built other mills, they might have employed other mill owners to do it for them. We think therefore the refusal to give the instruction before mentioned, was erroneous, and that the judgment must be reversed for that reason.

According to many authorities, another ground might have been claimed by the defendants for holding the case not within the statute, though none of the exceptions raise the question. That is, that it appears here, that the contract was to

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be, and was fully executed on the part of the plaintiff and his partner within the year. They delivered the logs to the defendants, and had nothing to do to perform it on their part, inasmuch as the defendants were to sell the lumber and pay themselves. This has been held to take the case out of the statute. The authorities upon the point are collected in Brown on Statute of Frauds, p. 287, *et seq.*

In *Donnellan vs. Read*, 3 Barn. & Ad., 899, which is the leading case on the subject, the court say: "As to the contract not being to be performed within the year, we think that as the contract was entirely executed on one side within the year, and as it was the intention of the parties founded on a reasonable expectation that it should be so, the statute of frauds does not extend to such a case." The doctrine does not seem to be fully settled in England, though it has been frequently approved; and it has been approved and sustained by a number of decisions in this country, and some quite recent ones. See authorities cited in Brown on Statute of Frauds, p. 290, note 4; and in addition, see *Blanding vs. Sargeant*, 33 N. H., 239, *Compton vs. Martin*, 5 Rich., 14. It was, however, questioned with considerable show of reason, in *Broadwell vs. Gilman*, 2 Den., 87.

There would seem to be strong reasons for holding to this rule, if it can be done upon a fair construction of the statute. For, notwithstanding the statute, men frequently trust their most important matters to verbal agreements, and where they have been so far acted on as to be entirely executed on one side, it must often cause great hardship to overturn the understanding upon which they have proceeded, and leave them afloat upon such implications as the law may furnish. On the other hand, where it is conceded that by the very terms of the agreement, it cannot be fully performed within the year by both parties, it seems to be taking considerable liberty with the language of the statute, to say that the case is not within

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it. But as this point was not raised by any exception, we shall not decide it.

There are also cases which hold that even where the case is within the statute, yet a party who has performed or in part performed it, cannot proceed by action to recover what he has paid or delivered, so long as the other party is willing to abide by it. *Abbott vs. Draper*, 4 Den., 51; *Westfall vs. Parsons*, 16 Barb., 649. The doctrine of these cases seems directly applicable here, because even if the case was within the statute, the plaintiff and his partner voluntarily completed the agreement on their part, and then, while the defendants were willing to perform and insisted on their right to perform, brought this action to recover possession of the logs they had delivered. But as this question was not presented to the court below, the case could not be decided upon that ground.

The instruction asked by the defendants as to the rule of damages, was clearly improper. They would have been entitled to the profits they might have derived from sawing the logs replevied, according to the contract.

But for the reasons before stated, the judgment is reversed with costs, and a new trial awarded.

PELTON *vs.* SUPERVISORS OF CRAWFORD COUNTY.

APPEAL FROM CIRCUIT COURT, CRAWFORD COUNTY.

Heard July 18, 1859.] [Decided December 14, 1859.

County Orders—Limitations.

A county order is a simple contract, and an action upon it is barred by the statute of limitations, in six years from the date of presentation for payment.

Although an action be barred on a county order, by the statute of limitations, still it is available to the holder, to the amount of its face, in payment of county taxes, under the provisions of the tax laws.

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This was an action brought on the 16th of March, 1858, against the county of Crawford, to recover a judgment upon a county order, signed by two of the commissioners of the county, and dated the 29th of May, 1843, and presented for payment on the 31st of October, 1843, and payment refused by the treasurer, "for want of funds in the treasury." The complaint claimed the amount of the order, $90 86, and interest, from the date of presentation. The answer set up, 1, denied the making and presentation within six years; 2, denied the presentation to the treasurer, according to law, and refusal to pay; and 3, since the date of the presentation alleged, the complainant had presented orders of a later date, which had been paid. On the trial, the order was read, &c., and the judge decided that the action was not barred by the statute of limitations; and judgment was rendered for the order and interest, from the date of the presentation—$186 52. From that judgment this appeal is taken to this court.

B. E. Hutchinson, District Attorney, for the appellant, assigned the following errors: 1. The court erred in deciding that the plaintiff's action was not barred by the statute of limitations. 2. The court erred in rendering judgment for the plaintiff, for the county order sued on. 3. The court erred in allowing interest on the order from the date of presentation; and 4th, in allowing any interest on the order.

Bull & King, for the respondent.

The actions founded upon any contract or liability which are barred by the statute of limitations, are only actions founded upon contract *in fact*, and not such liabilities as are created by construction of law. *Pease vs. Howard*, 14 John., 480; *Smith vs. Lockwood*, 7 Wend., 241.

The examination, settlement and allowance of the respondent's claim by the county commissioners, and being entered on record by their clerk, is in the nature of a judgment, and will be regarded as a speciality, in reference to the statute of limitations.

The order in this case being signed by the county commissioners, and attested by their clerk, is like a promissory note, signed in the presence of an attesting witness, against which the statute does not run. Rev. Stat. 1849, p. 643, § 1; and also Rev. Stat. Wis. Ter., 261, § 19.

County orders will bear interest after presentment at the

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treasury, and refusal of payment by the treasurer, but not before. *Robins vs. Lincoln County Court*, 3 Mo., 57.

It is a general rule that whenever a debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest, if he neglects to pay. Interest is recoverable on contracts for the payment of money from the time when the principal ought to have been paid. *Williams vs. Sherman*, 7 Wend., 109.

By the Court, COLE, J. We have decided at the present term, in the case of *Savage vs. The Board of Supervisors of Crawford County*, *supra* 49, that an action might be maintained upon a county order after the same had been presented to the county treasurer, and payment by him refused, for want of funds. The order in this case was issued in 1843, and in that year presented to the county treasurer, and payment refused. The respondent commenced his action upon the order in 1858, and the county, among other defences, has set up the statute of limitations. We are of the opinion that the statute bars a recovery. Section 14, chap. 127, R. S., 1849, declares that "the following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards." 1. "All actions of debt founded upon any contract or liability not under seal, except," &c. 4. "All actions of assumpsit, or on the case, founded on any contract or liability expressed or implied." Under the old practice, we suppose the proper form of action upon a county order would be assumpsit, and subdivision 4 of the section would apply to it.

But it was insisted by the counsel for the respondent, that the statute of limitations could not apply to an action brought upon a county order, for several reasons, which he gave; none of which, however, was satisfactory to our minds. We shall not notice these reasons in detail, but our observations will substantially dispose of them. The county order in this

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case is signed by two commissioners of the county board, attested by the clerk, and is in the usual form of such instruments. The order is unquestionably an evidence of a county liability, drawn by certain county officers, authorized by law to draw the same, upon another county officer directing him to pay the amount of money therein specified, out of any money in the treasury not otherwise appropriated. That an action upon it is founded upon the evidence of a county liability, or county indebtedness, is very clear. *Tyell vs. The Supervisors of La Pier County*, 6 McLean, 446.

It is analagous to a check drawn by an individual upon a bank, for the payment of money; though probably the rules of commercial paper do not apply to a county order; still, it is the evidence of a county liability, and an action upon it must be commenced within the time required by law.

It was suggested that a county order, under the laws of the State, was in the nature of a judgment, and might be regarded as a speciality; or was like a promissory note, signed in the presence of an attesting witness, &c. It would hardly be correct to say, that a county order was a judgment, in the peculiar and restrictive sense in which that word is used in the statute, or that it is a promissory or bank note. County orders constitute a form of indebtedness well known to the laws of the state; and it is very convenient for the board of supervisors, upon settling and allowing charges against the county, to evidence the indebtedness in this way. No advantage is gained by likening them to a judgment, speciality, or promissory note, although they may possess some of the characters, and perform some of the functions of each. We think they are a peculiar form of county indebtedness, and that the statute of limitations runs upon them, as upon a simple contract. Although an action might be barred upon them in six years, still, orders are available to the amount of their face, in the payment of county taxes, under the provisions of the

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statute; so that though an action will not lie upon an order upon which the statute of limitations has run, still it is not lost to the holder thereof.

From the view taken of this case, it becomes unnecessary to consider whether a county order issued before the adoption of the Revised Statutes of 1850, draws interest or not.

The judgment of the Circuit Court is reversed.

MARKWELL *vs.* BOARD OF SUPERVISORS OF WAUSHARA COUNTY.

APPEAL FROM CIRCUIT COURT, WAUSHARA COUNTY.

Heard July 23, 1859.] [Decided December 14, 1859.

County—Complaint—Demurrer.

An action can be maintained against a county, upon a county order, after the same has been presented to the county treasurer for payment, and payment refused for want of funds in the treasury.

If a complaint is not sufficiently certain, the remedy is not by demurrer, but by motion to have the same made more definite and certain.

The facts in this case will be readily gathered from the decision of the circuit judge, and from that of this court. The opinion of Judge Cate is as follows:

"The complaint in this action sets up a claim, on the part of the plaintiff, against the county, based upon county orders, issued by said county. The defendant, by its counsel interposed a demurrer, claiming that the complaint, admitting it to be true, establishes no claim against the county that can be the subject matter of a suit.

"In my judgment the demurrer is well taken, and must be sustained for the reasons following: The authority for issuing county orders, and the way and manner of cancelling

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them, are entirely statutory. Provision for their payment is also made by statute. County orders shall be received in payment for county taxes, so shall jurors' certificates; and sec. 129, chapter 13. of Revised Statutes, provides that county orders, properly attested, shall be entitled to a preference as to payment, according to the order of time in which they may be presented to the county treasurer; and our statutes contain liberal provisions for the redemption of county orders, by compelling collectors to receive them for taxes, and county treasurers to receive them from the town collectors.

"Aside from the statute, there is no method of enforcing payment of county orders; but the holder is compelled to pursue the mode pointed out; the whole tenor of our laws in regard to the issuing of county orders, the receiving them for taxes, and payment at the county treasury in the order of time in which they are presented, precludes the idea that a suit against the county can be predicated thereon, upon the failure of the treasurer to pay them on presentation.

"Then, again, upon general grounds of public policy, in my opinion, the right of the holder of a county order to maintain a suit thereon does not exist. The county board is in duty bound to raise a tax sufficient to pay the indebtedness of the county, outstanding orders, &c., and upon a refusal to do so, unquestionably could be compelled to perform that part of their duty. The board is under obligation to provide for the outstanding orders, and good faith to creditors and their absolute right, would oblige it to raise a tax sufficient for that purpose. In what better light would the holder of a county order stand after having obtained his judgment? He must then resort to the county board, and a special tax must be levied to pay the judgment.

"But suppose the board refuse, he must then resort to some power to compel them to do it; that tax may all be collected, or a part may be returned delinquent. So it must be seen that the holder of a county order does not materially advance his interest by suing, even if he had the right to do so, but the county would be immersed in a heavy bill of costs, in many cases exceeding the original demand. Section 42, chapter 13, cannot be construed as authorizing the maintaining of a suit against a county upon a county order, but was enacted to compel persons having claims other than county orders to present them to the county board for allowance before bringing suit upon them. The right to bring suit upon county or-

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ders, if once established, would lead to unpleasant consequences; it would cause derangement in the finances of the county—the funds of the county would be liable to be intercepted before reaching the treasury, by being levied upon to satisfy unpaid judgments. Town treasurers would be garnisheed, and much confusion and disorder would ensue.

There being no express statute authorizing a proceeding of this kind, I am of opinion, upon grounds of public policy, that the right to sue a county upon a county order, does not exist.

"The reasoning of the supreme court, in *Keep vs. Frazier*, 4 Wis., 224, perhaps has some bearing upon the case at bar.

"Demurrer sustained."

Upon filing this decision, judgment was entered in favor of the defendant and against the plaintiff for costs.

From this judgment the plaintiff appealed to the supreme court.

Spencer & Firmin, for appellant.

Abbott, Gregory, & Pinney, and *W. H. Webb*, for the respondent.

By the Court, Cole, J. This was an action commenced by the appellant for the recovery of the amount of certain county orders, issued by the board of supervisors of Waushara county. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the cause comes to this court, on appeal, from the order sustaining the demurrer.

In the case of *Thomas A. Savage vs. The Board of Supervisors of Crawford, Crawford County*, just decided, *supra* 49, we held that an action could be maintained against the board of supervisors, upon a county order, after the same had been presented to the county treasurer for payment, and payment refused, for want of funds in the treasury. It is unnecessary to re-assign here the reasons which led us to this conclusion.

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The decision in that case disposes of this appeal. The circuit court, in sustaining the demurrer, placed his decision upon the ground that an action would not lie upon a county order. In this, we think, he was in an error.

Another reason has been assigned here in support of the demurrer, which is, that the complaint is not sufficiently certain as to the amount of each order, to whom they were directed, and by whom signed, &c. If the complaint was defective for want of certainty, the remedy under the code was by motion to have the same rendered more definite and certain.

The order of the circuit court, sustaining the demurrer, is overruled, with costs, and the cause remanded for further proceeding according to law.

NICHOLS *vs.* KRIBS et al.

ERROR TO CIRCUIT COURT, JUNEAU COUNTY.

Heard August 20, 1859.] [Decided December 14, 1859.

Cognovit—Judgment—Assignment.

A confession for a judgment which states that the defendant purchased of the plaintiff in the month of March, 1857, a large quantity of goods and wares, at New York, to the amount and value of $1,916, at six months' credit from the 21st of March, and received the goods, &c., and there is now due said plaintiff the sum $1,090, &c., does not sufficiently state the facts upon which the indebtedness arose, to authorise the judgment to be rendered; and such a judgment will not protect the sheriff in making a levy upon the property of the defendant in the hands of his assignee.

An assignee for the benefit of creditors, may attack the validity of a judgment entered upon the confession of his assignor.

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This was an action commenced by the defendants in error, Frederick H. Kribs and Ephraim Myers, against George R. Nichols, the plaintiff, for the recovery of personal property, claiming title in themselves as the assignees of Moses K. & David Kribs, and averring detention, &c., by Nichols.

To the complaint Nichols answered, 1, general denial; 2, he alleged that the personal property at the time of commencement of said action was the property of Moses K. and David Kribs, and that defendants had no special claim or title therein; that about the 23d day of October, 1857, James Freeland, Robert Squires, Charles H. Bowen, Patrick H. Baker and William H. Freeland, duly recovered judgment in the circuit court of Juneau county against Kribs and Kribs, for $1,103 34, and it was duly docketed in the office of the clerk of said court at said time; that the judgment remaining unsatisfied, unpaid and undischarged of record, Freeland, Squires, Bowen, Baker, and Freeland, caused execution to be issued upon the judgment directed to the plaintiff in error, who then was sheriff of the county of Juneau, for execution; that by virtue thereof he duly levied upon and took into his possession as such sheriff, the personal property in the complaint stated, and held the same until they were taken from him in this action against him, by the coroner of Juneau county; that at the time of the taking, the property was the property of Kribs and Kribs, and liable to be taken on the execution.

On the trial of the case the plaintiffs below proved their title to the property; and the defendant offered to read a judgment record in the case named in his answer, as follows:

Title—"Statement and confession of judgment without action: We, residents of Juneau county, in the state of Wisconsin, do hereby confess judgment in this cause in favor of the above named plaintiffs for the sum of one thousand and ninety dollars and thirty-four cents, and authorize judgment to be entered therefor against us.

"This confession of judgment is for a debt justly owing and due to the plaintiffs, arising upon the following facts: The defendants purchased of said plaintiffs in the month of March, 1857, a large quantity of goods and wares at New York, to the amount and value of $1,915 72, at six months' credit from the 21st day of March, and have received said goods, and have paid of said sum the sum of $837; that there is now due said plaintiffs the sum of $1,090 34 aforesaid; that

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said defendants jointly as partners, purchased said goods of said plaintiffs as the firm of Freeland, Squires, & Co.

"MOSES K. KRIBS,
"DAVID KRIBS."

This was sworn to by the two Kribs, and the entry in the judgment book by the clerk was as follows:

"On filing the within statement and confession it is adjudged by the court that the plaintiffs do recover against the defendants the sum of one thousand and ninety dollars and thirty-four cents, with ten dollars costs, and the disbursements, amounting in all to the sum of $1,103 34.

D. McKERCHER, Clerk.

RICHARD SMITH, Plaintiff's Att'y."

"Dated October 23, 1857, at 4½ o'clock P. M. State tax paid, $1. Received and filed this 23d day of October, 1857, at 4½ o'clock P. M. D. McKIRCHER, Clerk."

This record was objected to and ruled out by the circuit judge. The defendant then offered the docket of the same judgment, and the execution on which he had seized the goods, to show his levy on the goods; but all of these were ruled out. The verdict was then found for the plaintiffs for the value of the property, $1,000, and six cents damages; upon which judgment was rendered. From that judgment this writ of error was brought.

Smith & Ordway, for the plaintiff in error.

The defendants in error, as the assignees of Kribs & Kribs, could not object that their assignees made an insufficient statement of a confession of judgment. They stand in the place of their assignors, who would have been estopped from raising this question in this form. The object of the code was to protect other judgment creditors from fraud; for their sole benefit the specification was required. Such is the tenor of all the authorities. *Chappel vs. Chappel*, 2 Kern., 257; *Dunham vs. Waterman*, 17 N. Y., 9.

The statement in question fully complies with the provisions of the Code, § 286; that is, it "states concisely the facts out of which the judgment arose;" the debt, its origin, and the necessary particulars thereof. It is full and precise enough to advise other creditors thereof; and shows *prima facie*, a fair and honest transaction, untainted with fraud or covin.

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L. Van Slyck, for the defendants in error.

The statement is not sufficient in this; it does not state the day of the month when the purchase was made, so that the creditors of Kribs could with any certainty investigate the *bona fides* of the transaction; the exact and true time of the purchase and payment should be set forth. *Gandal vs. Finn*, 13 How. Pr., 418.

The intention of the requirement of sec. 286, was to compel the person confessing the judgment, to disclose what was the real consideration of the judgment confessed, and to show to all interested, the transaction out of which the debt originated. *Dunham vs. Waterman*, 17 N. Y., 9; *Lawless vs. Hackett*, 16 John., 149.

By the Court, PAINE, J. The only question in this case is, as to the sufficiency of the statement of facts on which the judgment was entered, under which the defendant below sought to justify. There is considerable difference among the subordinate courts of New York, as to the degree of certainty required in statements of this kind. But the matter has been before the court of appeals, which has adopted the rule of those authorities which have been most strict in requiring certainty in them.

In *Chappel vs. Chappel*, 2 Kern., 215, and in *Dunhan vs. Waterman*, 17 N. Y., 9, the rule laid down in *Lawless vs. Hackett*, 16 John., 149, was held applicable to these statements under the code. And if this is a correct view of the matter, and we think it is, the statement in this case, although coming nearer to what is requisite than those in some of the cases, must be held insufficient.

In *Lawless vs. Hackett* it is said, "the specification ought to be so particular and precise as to apprise all persons interested of the nature and consideration of the debt. A statement as general as the common counts in a declaration, is not sufficient. It ought to be as special and precise at least as a bill of particulars. If, for example, the consideration was for

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goods sold, *the specification ought to state the kind, quantity and price of the goods,* "&c.

Now here, with the exception of stating the month when the goods were sold, the statement is as general as the common counts. It says the debt was for "goods and wares," which the defendants had bought of the plaintiffs. It states the amount of the price, but does not state anything as to the kind, quantity or nature of the goods. Fraud deals in generalities, and it does so necessarily, for the moment it attempts to be specific, it renders itself liable to detection. The object of the statute in requiring these statements, was to put on record a statement sufficiently clear and particular as to the facts to enable the fraud, if one exists, to be readily investigated and detected. And we do not think this object can be accomplished, if a statement like this is held sufficient. It may not be necessary to state the facts, as in a bill of particulars, but we think there should be something more certain than the general words "goods and wares," and that there should at least be some designation of the kinds and quantity of the goods, and that the date and place of the transation should be stated with as much accuracy as possible.

There can be no doubt that an assignee for the benefit of creditors was entitled to make the objection to the judgment.

The judgment is affirmed, with costs.

Dixon, C. J., took no part in the decision of this case, having been of counsel for one of the parties.

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SCHIEFFELIN et al. *vs.* WHIPPLE.

APPEAL FROM CIRCUIT COURT, PIERCE COUNTY.

Heard July 28, 1859.] [Decided December 14, 1859.

Declaration—Evidence—Amendment.

Where the cause of action arose upon a promisory note, and the declaration was in common money counts alone, without a copy of the note, then the note could not be read in evidence.

A plaintiff may amend his pleadings on terms so as to allow the note on which the action is founded to be read in evidence, if he would otherwise loose his right of action, by reason of the statute of limitation; and this, though the court had ordered a nonsuit, for want of evidence, but judgment had not yet been actually entered thereon.

The case of *Shoyer vs. Fox River Railroad Co.*, 7 Wis., 365, considered and approved.

This was an action commenced by declaration, containing only the money counts. The action was founded upon a promissory note for $367,61, dated September 2, 1850, and payable in six months from date. No copy of the note was given, nor was there any special count upon it. The declaration was served February 28, 1857, and the plea of the general issue interposed. The trial took place on the 25th November, 1857, before the court, without a jury, when the plaintiff offered to read the note in evidence, and it being objected to, was ruled out by the court and excepted to.

The court then asked the counsel for the plaintiffs if he had any further evidence to introduce, and he replied that unless he was allowed to introduce the note, he supposed the suit would have to go down. The court then directed a nonsuit to be entered, whereupon the plaintiffs moved the court for leave to amend their declaration upon such terms as the court might see fit to impose, so that the paper writing might be introduced and admitted in evidence. And the plaintiffs, by their counsel, in support of such motion, urged as a ground, and offered to show that the demand and cause of action of the plaintiffs, and which was evidenced by said paper writing, accrued on the 5th day of March, 1851, as appeared upon

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the face of said paper, and that the said demand and cause of action, was and would be barred by the statute of limitation, unless the paper could be introduced and admitted in evidence on the trial of this action.

The counsel for the defendant insisted that the court had no right to do so—it would take the defendant by surprise, being wholly unprepared to show that the note was paid, which counsel contended was a fact. And that if it was a matter of discretion, it would be an unwarrantable exercise of such discretion; and the court thereupon gave its opinion and decided that the ground urged by the plaintiffs in support of such motion was insufficient, and refused to allow the amendment, or any amendment of the declaration, and denied the motion of the plaintiffs, and stated that the nonsuit must stand, to which opinion and decision of the court the plaintiffs excepted.

The plaintiffs to maintain and prove the issue aforesaid on their part, offered to prove, by a competent witness produced for that purpose, an indebtedness of the defendant to the plaintiffs, as alleged in the counts contained in the declaration.

The counsel for the defendant objected, on the ground that a nonsuit had been entered. And the court did, thereupon give its opinion and decide that it was too late, a nonsuit having been directed to be entered, and excluded the testimony, and refused to receive or admit any testimony, that might be adduced, to which the plaintiffs excepted.

A judgment of nonsuit was, by the direction of the court entered, from which this appeal is brought to this court.

Dawson & Clapp, for the appellants.

Wetherby & Humphrey, for the respondent.

By the Court, Paine J. Conceding in this case that the court below was right in rejecting the note offered in evidence, under a declaration containing the common counts only, yet we think it erred in refusing to allow the plaintiff to amend upon terms. In disposing of this motion no stress was placed upon the fact that the court had already

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directed a nonsuit. That was done after the plaintiffs' counsel, in answer to a question whether he had further evidence, had said, "if the note was not admitted, he supposed the suit must go down." But immediately, and before any judgment was entered, on discovering that if driven to a new suit, his note would be barred by the statute of limitations, he moved for leave to amend upon terms. The court very properly still entertained the motion, and considered it upon its merits; but erred in overruling it. The power of amendment is frequently and justly exercised in such cases. And the fact that if driven to a new action, the party's claim will be barred, is of controlling influence in favor of its exercise. This court has already decided that amendments should be allowed in such cases, in the case of *Shoyer vs. Fox River Railroad Co.*, 7 Wis. 365. Of course it should have been, upon just terms, including a continuance, if the defendants were not prepared for trial.

The judgment is reversed with costs, and the cause remanded for further proceedings.

MOYER *vs.* STRAHL.

APPEAL FROM CIRCUIT COURT, PIERCE COUNTY.

Heard July 30, 1859.] [Decided December 14, 1859.

Appeal—Frivolousness—Usury.

Where the clerk of the circuit court makes a mistake in dating the time when an appeal is filed with him, or does not file it on the day it is served upon him, the party appealing will not thereby be deprived of his right to take the appeal.

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An answer which avers that the note on which the action is brought, was made payable in Minnesota, for the express purpose of evading the usury laws of this State, and also avers the usury, will not be declared frivolous, on a motion for judgment for that reason. Such an answer is not so clearly untenable and insufficient, that the court could determine its character upon inspection, without argument or research.

The cases of *Van Slyke vs. Carpenter*, 7 Wis., 173; *Grubb vs. Remington*, id., 349; and *Farmers' and Millers' Bank vs. Sawyer*, id., 379, considered and approved.

This is an action commenced by the respondent, John Moyer, against the appellant, O. Strahl, on a promissory note, made by the appellant, together with one S. R. Gunn, dated at Prescott, Wisconsin, June 26th, 1857, payable to A. P. Manning, or order, for the sum of $1,150, at St. Paul, Minnesota, due six months after date, with interest, at 12 per cent. per annum, from date. The note had been endorsed by the payee, and transferred to the respondent. The complaint was served on the 9th day of October, A. D. 1858, and was in the usual form, and verified. The answer of the appellant, which was also verified, set forth that in the making of the note there had been usurous transactions; that the real amount was $1000, and the $150 had been added, by way of usury; that the note was made payable at St. Paul, for the express purpose of evading the laws of Wisconsin, and not as the *bona fide* place of payment. The answer further averred payment of the sum of one thousand, which was, in fact, full payment for the note.

The plaintiff then moved the court for judgment, for the frivolousness of this answer. The motion was allowed, and judgment for the full amount claimed, $1,174 87, and costs; from which the defendants appealed to this court.

Wise & White, for the appellant.

Hill & White, for the respondent.

By the Court, Cole, J. A motion has been made to dismiss this appeal, for the reason, that it was not taken within thirty days, as required by the code. The order appealed from was entered on the 27th of November, and notice thereof given to the opposite party. The notice of appeal, which was served upon the clerk, is endorsed, filed, December 28. One of the attorneys, however, for the appellant, has

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made and filed an affidavit, in which he states, that the original notice of appeal was served upon the clerk, the same day that a copy thereof was served upon the attorney for the respondent, and that both services were made on the 23d of December. There is no counter affidavit filed, and we therefore are forced to believe that the clerk either made a mistake in dating the time the notice of appeal was filed, or that he did not file it the day it was actually served upon him. In either case, it would be hard to deprive the appellant of his right to an appeal on account of the mistake or default of the clerk, in filing the notice. The motion to dismiss the appeal is therefore denied.

The appeal was from an order adjudging the answer of the appellant frivolous. An examination of the answer will clearly show that it is not frivolous, within the decisions of this court, in the cases of *Van Slyke vs. Carpenter et al.*, 7 Wis., 173; *Grubb vs. Remington*, id., 349; and *The Farmers' and Millers' Bank vs. Sawyer*, id., 379. If its allegations in respect to the usurous agreement should be sustained, by proper evidence, and it should be proven that the note was made payable in Minnesota for the express purpose of evading the usury laws of this State, it would present a serious question as to whether this did not constitute a good defence to the action. But it is not necessary for us to express any opinion upon the sufficiency of this answer, and whether it discloses a state of facts constituting a good defence or not, and we must not be understood as doing so. It is manifest, that the answer is not so clearly untenable and insufficient, that the court could determine its character upon inspection, without argument or research. It admits of great doubt as to whether it does not set up a good defence.

The order of the Circuit Court adjudging the answer frivolous, must be reversed, and the cause remanded for further proceedings, according to law.

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DAVIDSON *vs.* DAVIDSON.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard November 14, 1859.] [Decided December 14, 1859.

Bills of Exception—Practice.

If a party to an action desire the supreme court to review the testimony, to see if it supported the conclusions of the court below upon the facts he should cause a case to be made, or bill of exception settled, embracing the testimony; otherwise, the facts will not be re-examined, even in an equity case.

A certificate of the judge who tried the cause that the printed case contains copies of the complaint, answer and evidence produced in the court, &c., cannot be used as a substitute for a case or bill of exceptions.

This action was brought to compel the conveyance by the defendant to the plaintiff of certain lands described in the complaint, alleged to have been purchased by the defendant as the agent of the plaintiff, and for his benefit. The complaint and answer were served respectively on the 30th day of June, and the 16th day of July, 1857. The complaint, in substance, set forth: That James Davidson, the plaintiff, complains of Robert Davidson, the defendant, and shows that on the first day of March, 1853, it was agreed by and between the plaintiff, who was then a resident of the Province of Canada West, and the defendant, who was then a resident of the town of Cottage Grove, county of Dane, Wisconsin, that the defendant should purchase for the plaintiff the following described lands, then owned by one E. D. R. Newcomb: The S. W. qr. of sec, 18, T. 7, R. 11, and the S. E. qr. of the S. E. qr. of sec. 13, T. 7, R. 10, in the county of Dane, on such terms of payment as should be agreed upon by the dedefendant and Newcomb. That after making the agreement with the defendant, the plaintiff returned to Canada for the purpose of removing with his family to Cottage Grove, and residing on the land to be purchased; that the defendant afterwards made an agreement to purchase the lands for about the sum of $400; the payment therefor to be made in amounts, and at times of which the plaintiff has no knowledge or information sufficient to form a belief. In accordance

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with the agreement, the plaintiff made payments to the defendant, to be by him applied on the purchase. In the spring of the year 1853 the defendant wrote to the plaintiff for money to pay and apply on the purchase, and the plaintiff immediately forwarded by mail the sum of one hundred dollars, in accordance with the request of the defendant, which sum the defendant received, and applied on the purchase of the land; that about the same time the defendant applied a horse, the property of the plaintiff, of the value of one hundred dollars, to satisfy the sum of one hundred dollars on the payments; that in the month of August, 1853, the plaintiff paid to the defendant, and the defendant applied also on the payments the further sum of fifty dollars, and that in the year 1854 the plaintiff paid the defendant the further sum of forty-seven dollars, which sum the defendant applied also on the payments for the lands; that previously, and in the month of August, 1853, the plaintiff, with the knowledge and at the request of the defendant, and in accordance with and by virtue of the purchase, took possession of and held and used the lands as the owner and purchaser thereof; built a house thereon, improved a part of the same by breaking and fencing thereof; has resided thereon with his family, and has had full and complete possession of every part thereof, ever since, except that the defendant has wrongfully, unlawfully and forcibly dispossessed the plaintiff of a part within the past year; that the defendant, without the knowledge or consent of the plaintiff, has obtained a deed for the lands from Newcomb, in his own name, paying the balance of the purchase money therefor, if any there was over and above the amounts by the plaintiff advanced to the defendant and by him paid thereon; that the defendant made the payment without notifying the plaintiff of the time or amount; that the deed of conveyance was by the defendant put upon record in the office of the register of deeds of Dane county, Wisconsin; that by the deed and the record thereof, the title of record to the lands was vested in the defendant, and still remains so vested in him; that on the twentieth day of February, 1857, the payment so made by the defendant over and above the amounts advanced by the plaintiff, with interest thereon, did not exceed the sum of three hundred dollars; that on the day last aforesaid, the plaintiff tendered and offered the defendant the sum of three hundred dollars in American gold coin, in payment of the sum so by the defendant advanced,

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and interest thereon; and also at the same time, the plaintiff presented and offered to the defendant a quit claim deed for conveying the lands to the plaintiff, and requested the defendant to sign and execute the same, but the defendant refused to receive the sum tendered, or to execute the deed, and still does so refuse; and the plaintiff then averred readiness to pay the amount due, and brought $300 into court; that the purchase of the lands was to be and was made by the defendant, at the request of the plaintiff as his agent, and that there was a distinct agreement between the parties that the title to the lands was to become vested in the plaintiff and not in the defendant, when full payment should be made; that the money advanced by the defendant was advanced and was received by Newcomb, for the use of the plaintiff, and on his account; that the obtaining of the deed in the name of the defendant, was without the knowledge or consent of the plaintiff, and contrary to the express agreement between the parties hereto.

Wherefore, the plaintiff prays that the defendant may be adjudged to convey the lands to the plaintiff by a good and sufficient conveyance, &c.

The answer of the defendant set forth in substance: 1. He denies that on the first day of March, 1853, or at any other time, it was agreed between him and the plaintiff, that the defendant should purchase for the plaintiff the lands in the complaint described. 2. He admits that he purchased the lands of Newcomb on the 27th day of July, 1852, not for or on behalf of the plaintiff, but for his own proper use and benefit. 3. He admits the receipt of money at divers times from the plaintiff, but denies that the money, or any part thereof, was received for the purpose of being applied as alleged in the complaint; also, admits the receipt of a horse from plaintiff, but denies that its value was to be applied as in the complaint alleged. 4. Admits that plaintiff took possession at the time in complaint stated of a portion, but only a portion, of the lands, but he denies that such possession was or is any other than that of tenant under this defendant; further, admits that he has obtained a deed of the lands in his own name, and has paid the purchase money for the same, as he had a just and lawful right to do, but whether with or without the knowledge of the plaintiff he knows not; and, further, he denies that by any agreement whatever the title was to be vested in the plaintiff, or any moneys received were

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to be applied on the purchase for the benefit of plaintiff, and also denies that any moneys paid to Newcomb were paid, or by Newcomb received for the use or on the account of the plaintiff.

The testimony in this case as printed is very lengthy, but as it is rejected by this court will not be noticed. The finding of the facts and judgment of the circuit court sustains the averments of the complaint, and was dated the 13th of July, 1858. From that judgment the defendant appealed to this court. He also procured a certificate of the judge who tried the case, but who at the date of the order was out of office, as follows:

I certify that the foregoing are copies of the complaint, answer, evidence, produced in court in the form of depositions, finding and judgment in the case of James Davidson, plaintiff, against Robert Davidson, defendant, in the circuit court for Dane county.

A. L. COLLINS,
May 31, 1859. Late Circuit Judge.

Smith, Keyes & Gay, for the appellant.

Wakeley & Tenney, for the respondent, objected that the finding and decision of the court below could not be reviewed in this court; because there was no bill of exceptions taken to the decision; and, therefore, the evidence is not before the court.

By the Court Cole, J. We do not find in the return made by the clerk of the circuit court any bill of exceptions or case embracing the testimony, which was used upon the trial of this cause, and we, therefore, can only consider such errors as are apparent upon the record. In looking into the record we do not discover any error; the finding of the court upon the facts supports the judgment; and we must presume the finding of the court was warranted by the evidence produced on the trial. If the appellant had desired this court to review the testimony, to see if it supported the conclusions of the court below upon the facts, a case should have been

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prepared and settled or a bill of exceptions, embracing the testimony, as required by the rules. The judgment was entered in July, 1858; and we find at the end of a printed case, purporting to contain the evidence used upon the trial, a certificate of the late circuit judge of the 9th circuit, bearing date the 31st of May, 1859, certifying that such printed case contains copies of the complaint, answer and evidence produced in court, in the form of depositions, &c., but no such testimony is sent up with the return of the clerk, and it is not pretended that any case was made or bill of exceptions prepared embracing the testimony within the time prescribed by the code and the rules of court. The respondent insists that because there is no bill of exceptions, or case, that the evidence is not before this court for review; and we think this position well taken. The appellant probably fell into an error by not considering the change in the practice introduced by the code. Formerly, in equity cases, the party obtaining the decree in the court below was compelled to have the evidence preserved and returned to this court, properly authenticated, which supported the decree; but, now, the party appealing must preserve the evidence by incorporating it in a bill of exceptions, or case, settled within the time prescribed, with such exceptions as were taken during the trial; otherwise the evidence cannot be received.

The judgment of the court below is affirmed.

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SMITH *vs.* WELCH et al.

APPEAL FROM COUNTY COURT, DANE COUNTY.

Heard August 17, 1859.] [Decided December 14, 1859.

Appeal—New Trial—Instructions—Replevin—Frauds.

An appeal from an order refusing a new trial, upon the ground that the verdict was contrary to law and evidence, does not bring up for the review of the Supreme Court any error of the judge in refusing instructions asked for.

The question before the court, was fraud in C. in making a sale of goods, to S., and retaining possession until a creditor of C. had levied upon them; and the court refused to instruct the jury, that if they should find the sale to have been made in good faith, and to pay a *bona fide* debt, then the question of the possession of the goods did not enter into the case at all. Held, that such instruction was properly refused.

If S. suffers his goods to be so mingled with those of C. that an officer having a writ against the goods of C., cannot distinguish them, but takes all the goods, then S. cannot maintain an action against the officer who has seized them, until notice, and demand and refusal.

This was an action brought against the defendants for taking from the plaintiff a quantity of goods, wares and merchandize, in a store at Mazomanie, in Dane county. The answer denied the possession of the plaintiff, and also his title; sets up as a defense, that at the time of the taking Barney Campbell was in possession of and the owner of the goods, ware and merchandize, and Campbell was then indebted to William M. Sinclair, and Austin Gunnison, merchants of the city of Milwaukee, for goods, &c., before that time sold and delivered to Campbell, and that Sinclair & Gunnison on the 9th day of June last, commenced a suit in the circuit court for the county of Dane, against Campbell, for the recovery of his indebtedness, and a warrant of attachment was issued and directed to the sheriff of the county of Dane, commanding him to attach the goods, &c., of the defendant therein, Barney Campbell, to satisfy said demand, and the attachment was placed in the hands of John D. Welch, who then was sheriff of the county of Dane, for execution; and Timo-

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thy S. Chapman, who was then and still is a deputy sheriff of said county, received said process of attachment for execution, and that by virtue of such warrant of attachment, Chapman took the goods, wares and merchandize, mentioned in said complaint, and that by virtue thereof, and the execution issued in said action, in which judgment was afterwards, and before the commencement of this suit, duly rendered, he still detains said goods, as lawfully he may do.

The answer further averred fraud in the sale by Campbell to Smith, and that the sale was intended to hinder the creditors of Campbell.

The cause was tried by a jury, and considerable testimony given on both sides, relating to the possession of Campbell to the goods in question, from which it appears that the sale was made to the plaintiff on the 17th of May, 1858, by Campbell, and that Campbell remained in possession, as clerk of Smith, until the taking of the goods on the 9th of June, 1858. The goods were worth $839.

The defendants read their writs, and proved that the debts due Sinclair & Gunnison existed prior to the 17th of May, 1858. On that day he was at the store and Campbell was in possession, and selling goods as usual; that on the last day of May, Campbell said he was afraid his creditors would pitch on to his goods and break him up, but as fast as he could realize from the sale of the goods sold Mr. Smith, he would pay it over to his creditors, Sinclair & Gunnison among others. At the time of the conversation, Mr. Campbell was in the store selling goods. Smith's name was on the sign of the store; the family of Campbell lived in it.

To rebut this evidence the plaintiff proved that Campbell was indebted to him about $1,100 for money loaned and labor, and, at the time of the purchase, he endorsed the amount of the goods on the note. He was to pay $6 a month as rent for the store, and $35 for services as clerk. He did not know that Campbell was badly in debt at the time of the purchase. After the purchase from Campbell the plaintiff had bought $175 worth of other goods and put them into the store; and about $75 of these were in the store at the time of the levy.

Plaintiff's counsel requested the court to instruct the jury, that a man being in debt, has a right to pay such debt out of his property, although he might be embarrassed at the time; and if the debt to Mr. Smith was *bona fide*, the sale was good

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under the statute, and the plaintiff has a right to recover in this action, and that if the jury found the sale by Campbell to Smith to have been made in good faith, and to pay a *bona fide* debt, the question of the possession of the goods did not enter into the case at all.

The court refused to give this instruction, and the plaintiff excepted, and the court instructed the jury: That fraud was a question of fact, and that if they were satisfied that the plaintiff had given a good reason for leaving the property in the possession of Mr. Campbell, he had a right to recover.

The jury found a verdict for the defendant, and the plaintiff moved for a new trial, founded on the judge's minutes, on the ground that the verdict was contrary to law and evidence; which motion the court overruled, and the plaintiff has appealed to this court.

Smith, Keyes & Gay, for the appellant.

The court erred in refusing to give the instruction asked for by the plaintiff. The verdict should have been given for the amount of goods in the store which Smith had bought of others and put into the store.

J. C. Hopkins, for the respondent.

By the Court, PAINE, J. This is an appeal from an order refusing a new trial. It appears from the case that the motion was made on the minutes of the judge, "upon the ground that the verdict was contrary to law and evidence." This does not properly bring up for review any error of the judge in refusing instructions asked. But as his refusal was urged as a ground for reversal by the appellant's counsel, we will say that we think the instruction, in the form in which it was asked, was properly refused. It was a question of fraud in the sale from Campbell to the plaintiff, Campbell having remained in the actual possession of the goods. The last part of the instruction is, that if the jury should find the sale "to have been made in good faith, and to pay a *bona fide* debt, the question of the possession of the goods did not enter into the case at all." It is very evident that the question of pos-

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session had a very important bearing on the question, whether the sale *was* "made in good faith," and the jury must consider it, in determining that. But this instruction implies that they might pass on the question of good faith, independent of the question of possession; and having, in this manner, come to the conclusion that the sale was *bona fide*, might leave the vendor's possession entirely out of view. This would clearly have been erroneous. If it was only meant to say that the real question for the jury was that of good faith in the sale, and that this might exist, notwithstanding Campbell's continuing possession, the instruction was not framed with sufficient accuracy to express that idea.

As to the question whether the verdict was against law and evidence, we think it very clear that the court below ought not to have disturbed the verdict upon the point of fraud in the sale; and still clearer, that this court ought not to reverse the order upon that ground. The only point upon which there is any room for doubt is, whether the verdict should be set aside because the evidence required it to be for the plaintiff to the extent of the goods purchased by him after the sale from Campbell, which were seized and sold on the attachment. The evidence upon this point is, that the plaintiff purchased about $175 worth of such goods, and Campbell thought about $75 worth remained in the store at the time of the seizure. But he also testifies that he was there in possession as the plaintiff's clerk, and that Chapman requested him to point out the goods so subsequently purchased by the plaintiff, and that he did not do it. Upon these facts, we think the case as to these $75 worth, comes within the rule that where one suffers his goods to be so mingled with those of another, that an officer having a writ against those of the other, cannot distinguish them, he cannot maintain an action against the officer who has seized them, until notice and a demand and refusal. *Bond vs. Ward*, 7 Mass., 127; *Sawyer*

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vs. Merrill et al., 6 Pick., 430; *Shumway et al. vs. Rutter*, 8 Pick., 447; *Harding vs. Coburn*, 12 Met., 342.

In the case last cited, the court, while recognizing the rule, thought the facts were not such as to justify its application, and suggest that it should be applied with care. This is perhaps true, but even with this caution in view, we think this case comes fairly within it. In the first place, the party attaching demanded of the plaintiff's agent that he should designate these goods, which he neglected to do. And, furthermore, the jury found that the sale from Campbell to the plaintiff was fraudulent, which brings it within the remark of the court in *Saumway et al. vs. Rutter*, as to a fraudulent collusion between the owner of such goods and the debtor, for the purpose of preventing an attachment.

The order appealed from is affirmed, with costs.

ILSLEY *vs.* HARRIS.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard August 18, 1859.] [Decided December 14, 1859.

Capias—Bail—Partnership.

If a party arrested on a defective process, put in special bail for his appearance, he thereby waives all objection to the process.

Where several partners made an assignment of their joint property, and afterwards one of the partners unlawfully obtained possession of a portion of it, and converted it to his own use, he may be arrested for such cause of action, and held to bail under the code.

The court will not vacate an order for arrest because the officer making the arrest does not serve the copy of the affidavits for the space of two hours after the arrest is made, if the arrest is otherwise regular and proper.

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An order for arrest of the defendant in a suit, is a *writ* or *process* within the constitution, and should run in the name of "the state of Wisconsin;" but such style is matter of form, and may be amended on motion.

The facts of this case can be gathered from the opinion of the court, and will not be restated.

Smith, Keyes, & Gay, for the appellant, insisted that the order of arrest should have been vacated by the court below, because it was irregular on its face. The constitution provides that "the style of all writs and process shall be *The State of Wisconsin.* Process signifies the writ or judicial means by which the defendant is brought to answer. Bonv. Dic. "Process."

The order of arrest is directed to the sheriff for execution, is a substitute for the old writ of capias, and is the judicial means by which the defendant is brought to answer. It is a process within the meaning of the constitution; it is not in this case styled in accordance with the requirements of the constitution. It is, therefore, irregular on its face, and should be vacated, the defendant not having waived any defects in the process by a general appearance. *Sprague vs. Birchard*, 1 Wis., 469; *Little vs. Little*, 5 *Mo.*, 227; *Fowler vs. Watson*, 4 id. 27.

The sheriff must, "upon arresting the defendant," serve upon him a copy of the affidavit on which the arrest is made. Code, sec. 92.

Abbott, Gregory, & Pinney, for the respondent. The order for arrest is not a writ or process within the meaning of the constitution.

By the Court, Cole J. This is an appeal from an order of the circuit court of Dane County, refusing to vacate an order for the arrest of the appellant. The affidavit and order for the arrest were made on the 24th day of November, 1858, and upon that day, the appellant being arrested, gave satisfactory bail and was discharged. On the 2d of December the appellant obtained a rule, or order, based upon his own affidavit, and the affidavit and order for arrest, for the plaintiff in the action, to appear and show cause why the order of arrest

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should not be vacated. The reasons assigned in the order to show cause, &c., and which reasons are principally relied upon in this court, to show the incorrectness of the ruling of the circuit court in refusing to vacate the order of arrest, are the following: 1. Because the said order of arrest is irregular in this, that it is not styled "The State of Wisconsin," as required by law. 2. Because the said order of arrest was improperly granted, for the reason that the affidavit upon which said order was made, does not disclose a case wherein an order of arrest can be made by law. 3. Because it appears from the said affidavit of the defendant herein, hereto annexed, that no cause of action existed on the part of the said plaintiff against the said defendant in this action, wherein an order for the arrest of the said defendant can by law be made. 4. Because no copy of the affidavit on which said order of arrest was granted in this action, was served on said defendant at the time when the said defendant was arrested, under said order, as is required by law.

We will now proceed to notice these objections, which fairly present all the questions arising upon this appeal. Assuming that the position of the counsel for the appellant is correct, that the order for the arrest is a process or writ within the true intent and meaning of section 17, art. 7 of the constitution, and should run in the name of "The State of Wisconsin," and that the order in this case was irregular upon its face, for not being so styled; still, we think this irregularity is waived, by the appellants putting in bail to the action. In the case of *Wright vs. Jeffrey*, 5 Cow., 15, where the suit was commenced by a *capias*, returnable on Sunday, and the defendant had put in special bail, without knowing this fact, the court held that the defect had been waived. *Vanderpool vs. Wright*, id., 209; *Pixley vs. Winchell*, 7 id., 366; *Bronson vs. Earl*, 17, J. R., 63; *Stewart vs. Howard*, 15 Barb. S. C., 26; and other authorities cited in 1 Bur. Prac., 474. If

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the appellant wished to preserve his right to object to the order because it did not run in the name of the state, and was, therefore, irregular and void, he should have raised that objection before putting in bail. He must now be deemed to have waived it.

The next objection is that the order of arrest was improperly granted, for the reason that the affidavit upon which it was made, does not disclose a case wherein an order of arrest can be made. The affidavit was made by Edward D. Ilsley, as agent for the respondent, who stated therein in substance, that prior to the 25th of October, 1858, Tibbitts, Gordon, and the appellant, were partners, doing business at Madison; that on that day the partnership was dissolved, and by the consent and asssignment of each of said partners, all the property and effects of the firm were transferred to, and placed in the respondent, as the trustee for the benefit of said firm, and to be used and applied by him in paying and discharging the debts and liabilities of said firm; that the respondent accepted the trust; that certain moneys, which were specified in the affidavit, were transferred by the assignment; and that the appellant, without right or authority so to do, obtained possession of said money, and wrongfully appropriated the same to his own use. From these statements we are compelled to assume that there was a valid assignment made by the partners of the partnership property, for the benefit of creditors, and that the money in controversy was embraced in the assignment. That being the case, if the appellant unlawfully obtained possession of it, and converted it to his own use, it would constitute a wrongful conversion, for which an action of trevor would lie under the old practice. It is very manifest that the appellant might be arrested for such a cause of action under the code, section 87.

We shall not refer, with any great particularity to the affidavit of the appellant, which was taken to show that no cause

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of action existed against him, for wrongfully taking and converting this money. He states facts tending to show that most of this money was in his possession before the assignment; that it was not transferred to, or ever come to the possession of the assignee, but was charged to him upon the books of the firm, in making up the cash account, on the 26th day of October, &c. In view of the matters set forth in the counter affidavits of Ilsley and Baker, there is strong reason for supposing that the appellant is mistaken, to some extent, in these statements. So it appears to us from these affidavits. But as these matters will undoubtedly be the subject of investigation and inquiry before the jury, it would be improper for us to express any further opinion in reference to them. From all the facts set forth in the affidavits on both sides, we think it appears that the respondent had the right to arrest the appellant; but the truth of these facts may be successfully controverted when the action is tried upon the merits.

The fourth ground relied on for vacating the order of arrest, namely, that there was no copy of the affidavit served, is not sustained by the return of the officer, who returns that he did serve such copy at the same time of the arrest. The appellant alleges in his affidavit that no copy was served upon him until he had been about two hours in custody. Even if this were so, it would not constitute a sufficient ground for vacating the order, under the circumstances of this case.

The order of the circuit court is affirmed.

Dixon, C. J., took no part in the decision of this case, as the same was tried before him at the circuit.

[A motion for a rehearing having been granted in this

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case, the following further opinion was filed on the 4th day of June, 1860.]

PAINE, J. A motion for a rehearing was granted in this case, for the reason that it was formerly decided upon the ground that the defendant had waived all objection to the order of arrest, by putting in bail; overlooking the specific provision of the code, that the motion may be made at any time before the justification of bail. Under that provision it would seem that the motion was in time. But we are still of the opinion that it was properly overruled. For although we think an order of arrest is a process within the meaning of the constitution, which requires all process to run in the name of "The State of Wisconsin," yet it was a matter of form, and the defect was amendable. The authorities cited by the counsel for the respondent on the rehearing, established the position that an amendment may be allowed to cure a defect arising from the non-observance of a constitutional direction, as well as of a statutory one. We think the court should have allowed an amendment of the order, and not have vacated it for that reason, and, therefore, we affirm it as before.

NOTE.—The authorities referred to as cited by counsel, are *Parsons vs. Sweet*, 32, N. H., 87; *Ripley vs. Warren*, 2 Pick., 592; *Lovell vs. Sabine*, 15 N. H., 37; *Marston vs. Bruchett*, 9 id., 336, 349; *Whiting vs. Beebee*, 7 Eng., 536; *Reynolds vs. Donnell*, 19, N. H., 324; *State Bank vs. Buckmaster*, Breese, 122; *Norton vs. Dow*, 5 Gilm., 459; *McCormick vs. Meason*, 1 S. & R., 97.

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STATE *ex rel.* CHAPPELL *vs.* GILES.

APPEAL FROM CIRCUIT COURT, JEFFERSON COUNTY.

Heard August 28, 1859.] [Decided December 14, 1859.

Contempt—Assistance, writ of—Practice.

In general, no appeal will lie to this court, upon a conviction for contempt; but section 12, chap. 155, R. S. 1858, has excepted a sheriff from this rule.

Where a sheriff had in his hands a writ of assistance, lawfully issued, to execute, he cannot excuse himself from its execution, because the defendant, in the writ, claims to hold the possession under a party having a title elder than the title of the claimant in the writ.

This was a proceeding in the Circuit Court of Jefferson county, at the February term, A. D. 1859, instituted by the respondent as relator, to punish the appellant for a contempt of court, in neglecting to execute a writ of assistance, issued by the clerk of the court, and delivered to Ernest Off, the under sheriff of the appellant; and was based upon the affidavits of H. Mulberger, and J. J. Enos, attorneys for Chappell; and upon the relation, an attachment was issued and served by the coroner, and the appellant, being in custody, answered interrogatories which were propounded to him. The facts of those answers and defence appear by the opinion of the court, as also the order convicting the sheriff of contempt.

Williams & Leonard and *C. R. Gill*, for the appellant.

Enos, Hall & Mulberger, for the respondent.

By the Court, PAINE, J. This is an appeal from an order of the Circuit Court of Jefferson county, by which the sheriff was adjudged guilty of a contempt, for not executing a writ of assistance, and fined ten dollars and costs. The general rule in relation to convictions for contempt is, that there is no appeal. But there is a very clear distinction between those

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proceedings for contempt which are merely in the nature of civil remedies, for the benefit of the party injured, and those aimed at conduct which tends directly to interrupt the proceedings and impair the authority of the court. In respect to the latter, it is essential to the very object of granting the power to punish for contempt, that it should not be subject to appeal. *Vilas & Platt vs. Burton et al*, 27 Verm., 56; *Hunter vs. The State*, 6 Ind., 423; *Ex parte Alexander*, 2 Am. Law Register, 44; *The State vs. Tipton*, 1 Black., 166; *Ex parte Kearney*, 7 Wheat., 38; *Lockwood vs. State*, 1 Carter, Ind., 161. Such being the general rule, the order in this case would not be appealable without an express statutory provision. But our statute has so far excepted the proceeding against a sheriff for neglecting to execute process, from the general rule, as to make orders therein appealable. § 115, chap. 13, R. S. 1858. It will therefore be necessary to examine this order upon the merits.

The material facts appearing from the affidavits and answer of the sheriff to the interrogatories on the attachment, are these: In the suit of *Chappell vs. Cooley and others*, a judgment of foreclosure has been rendered, and the premises sold and bid in by Chappell. A deed was executed to him as purchaser, and he then, by his agent, demanded of Cooley the possession of the premises, which was refused, Cooley being the mortgagor and principal defendant, and being in possession at the time. A writ of assistance was then procured, and delivered to one of the sheriff's deputies. Proceedings on the writ were stayed by several orders, which were successively vacated; and the deputy went to the premises and still found Cooley in possession. Cooley went out, and came back with Chadwick, who then set up the claim of ownership, under a sale in proceedings, to enforce a mechanic's lien, accruing prior to the mortgage; and that Cooley was in possession under him, as his tenant at will. Chad

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wick was not made a party to the foreclosure suit; and upon this state of facts, the officer declined to execute the writ, for the reason, as the sheriff states in his answer, that it might occasion a "breach of the peace, and the perpetration of a great outrage, under the forms of law, upon the rights of the said David S. Chadwick."

The counsel for the appellant urged upon us, with much force, the general principle, that judgments do not affect the rights of those not parties, and that it would be great injustice to have the writ of assistance executed here, against Chadwick, who was not a party to the foreclosure suit, and who claimed under a prior and paramount title. And in support of this position, he referred us to *Pelletreau vs. Frelinghuysen et al.*, 4 Paige, 204; *Van Hood vs. Throckmorton*, 8 Paige, 33; *Boynton vs. Jackway*, 10 id., 307; *Miller vs. Estell*, 8 Yerg., 452; Littel, 304.

These authorities undoubtedly establish the doctrine, that when it appears to the court, on an application for a writ of assistance, that a person is in possession, who was not a party to the suit, and claims, not under a party after suit commenced, but under an adverse title, the court should refuse the writ; because such an adverse claim should not be tried upon such a summary proceeding. But we think this rule does not reach the question presented here. Whether a court should issue a writ in such a case, is one question; but whether, being issued and placed in the hands of an officer, he can institute an inquiry into the rights of various parties who may claim to be in possession, and execute or refuse to execute his writ, according to his decision upon the facts, is entirely a different question; and we do not think he has any such right. If the court ought not to determine upon adverse claims, upon an application for the writ, surely the officer ought not to determine them, after the writ is issued. Such determination is no part of his function. His duty is to ex-

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ecute his writ, if issued by competent authority; and precisely because that is his duty, and because he has no power or right to inquire into the propriety of issuing it, such a writ constitutes a complete protection to the ministerial officer. If his writ is issued by a tribunal having jurisdiction of the subject matter, as was the case here, and be not void on its face, he is bound to execute it, unless its execution is stayed by some appropriate proceeding; and he is not the tribunal to apply to for that purpose. It would be utterly subversive of all system and propriety in the conduct of legal proceedings, to allow an officer to institute such inquiries, and act or not act as he might find the fact to be. It would be transferring to him the functions of the tribunal whose decisions he is to execute, and not to question or review. If writs are sometimes issued improvidently, and if parties occupying such a position that their possession ought not to be interfered with by such writs, may be obliged to suffer a temporary inconvenience in some cases, it is much better that this should occur, than that the officer should be allowed to adjudicate upon the matter. Such parties would generally have an opportunity to obtain an appropriate remedy before being disturbed in their possession; but if not, they could obtain it afterwards. The officer is not to furnish it. Suppose a writ of replevin placed in a sheriff's hands, and when he comes to the defendant and finds the goods with him, the latter presently calls in a third party, who sets up that the goods belong to him, and that the defendant is only holding them as his agent; would this be an excuse for the sheriff for refusing to serve the writ? Clearly not. If proceeded against for a contempt, would it be a good answer for him to offer affidavits showing that the goods really belonged to such third party, and then to say that he neglected to execute the writ, for fear that he might be "perpetrating an outrage upon his rights, under the forms of law"? No one would pretend it.

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And we think the question here is in principle the same. Officers should not in such cases take upon themselves the responsibility of adjudicating upon the rights of parties, and then attempting to excuse themselves from not acting, by setting up those rights. They are not to be determined in that way. We think upon this broad ground the order appealed from must be affirmed. And we think the facts in this case peculiarly illustrate the correctness of this rule; for here Cooley, the mortgagor, and principal defendant in the suit, was in actual possession, not only when the writ issued, but after the officer arrived at the premises to execute it. And certainly it cannot be allowed that in such a case the officer is to stop proceedings, as soon as such a defendant goes out and calls a third party, who comes and sets up that the defendant is in under him. Such a proceeding looks like collusion, on its face. Secret or private arrangements between a defendant in possesion and another, by which the character of the possession is changed, are not to be inquired into by an officer who comes with his writ and finds the defendant in possession. And if it was not proper for him to make such an inquiry, and act upon it, then it is not proper to make it as a defence in this proceeding, whatever the fact may be.

The order appealed from is affirmed, with costs.

Dixon, C. J., took no part in the decision of this case, as the same was tried before him, at the Circuit.

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McDONELL *vs.* DODGE.

ERROR TO CIRCUIT COURT, DANE COUNTY.

Heard August 31, 1859.] [Decided December 14, 1859.

Agent and Principal—Frauds, Statute of.

When there was conflicting evidence given in a case as to the extent of an architect's authority to purchase materials for a building over which he had charge, it is not proper to instruct the jury, that if they should find that the vendor at the time of the sale, had reason to believe, from the acts of the parties, that the architect was authorized to purchase such materials, then the owner was liable.

It is not proper in such a case, to instruct the jury that if they should find that the architect was the agent of the defendant, the owner, then his admissions and declarations would bind the defendant; and if he was acting for the defendant as his agent about the building, although his authority might not expressly extend to the purchasing of materials, still, if the vendor believed he was authorized to purchase, the defendant was liable.

When W. sold lime to K. to construct a building for M., and after the sale M. promised to pay W. for the lime, such promise is not binding on M., unless reduced to writing, with a consideration expressed.

This was an action commenced before a justice of the peace of Dane county, to recover the value of a quantity of lime claimed to have been sold by Daniel Williams to one Kline, to use in constructing a building for McDonell. The cause was appealed to the county court, and judgment was rendered in favor of the plaintiff below, who was the assignee of Williams, for the amount of the claim. The effect of the testimony is sufficiently stated in the opinion of the court. After the testimony was delivered the judge instructed the jury: "that if they found that Donell was the agent of the defendant, and that he bought the lime of Williams, the defendant was liable. The question of agency was one of law and fact; that it might be established by ratification of the acts of another, as well as by direct authority. That if the jury should find that Williams, at the time of the sale of the lime, had reason to believe from the acts of the parties that Donell was the agent of the defendant, the defendant would be liable; that in such case the question is not what power the principal

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intended to give his agent, but what power third persons who dealt with the agent, and who insist on his acts as valid, had a right to infer that he possessed from his own acts and those of his principal; that if the jury should find that Donell was the agent of the defendant, then his admissions and declarations would bind the defendant; that if he was acting for the defendant as his agent about the building, although his authority might not expressly extend to the purchasing of materials, still, if the plaintiff's assignor sold to him believing he was authorized, the defendant would be liable."

To each sentence of this instruction the defendant excepted, and the asked the judge to instruct the jury as follows:

"1. That the defendant is not liable unless the lime was originally sold and delivered to him; a promise to pay after the delivery to Kline, in order to be binding, must be in writing; and if the jury find that the lime was sold by Williams to Kline, the defendant is not liable to the plaintiff in this action.

"2. That the jury are judges of the facts, but the facts in relation to the agency being proven, the court is to decide whether the facts as proven constitute an agency. As to what constitutes an agency is a question of law. The court must decide whether the evidence constitutes an agency, and in this case there being no conflict, the court should charge the jury that Donell had no authority to bind the defendant for the lime in question, by any of his acts or declarations.

"3. To constitute a ratification by McDonell of Donell's unauthorized acts, it must be proven that at the time of such pretended ratification he had full knowledge of the act and the whole of the acts which it is claimed he ratified."

All of which the judge refused to give, and the defendant excepted. And the jury, under the charge of the court, returned a verdict in favor of the plaintiff for the sum of ninety-eight dollars and thirty-two cents." Upon which judgment was rendered and the defendent below sued out this writ of error.

J. C. Hopkins, for the plaintiff in error.

Welch & Lamb, for the defendant in error.

By the Court, Cole, J. We will not stop to notice all the exceptions taken to the rulings of the county court on the trial

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of this cause; but will dispose of the case mainly in considing the correctness of one or two of the instructions which were given to the jury; and the error of the court in refusing to give one of the instructions asked to be given on the behalf of the plaintiff in error. It is quite apparent that the whole contest narrowed itself down to the inquiry whether Donell as agent of McDonell, bought the lime in controversy; if so, whether, in the first instance, he was authorized to buy it, as well as other materials, for the building; or if not authorized to do this thing, whether his unauthorized act, in buying the lime, had been plainly ratified by the principal so as to bind the latter and render him liable to pay for the lime.

The whole case shows that Donell was the agent of the plaintiff in error for certain purposes, and, as a matter of course, could bind his principal while acting within the scope of his authority. But it was insisted that it did not by any means follow that because Donell was the agent of the plaintiff in error, for one purpose, and to transact one kind of business, that therefore he was an agent for all purposes, and for the transaction of all kinds of business. The precise limit and extent of the agency was the point in dispute between the parties. For, while conceding that Donell was the architect for drawing the contracts, furnishing plans, making estimates of work done and materials found, and of paying the contractor the money due upon such estimates from time to time, the plaintiff in error denied that Donell had ever purchased the lime, or had any authority whatever from him to purchase it, or any other materials. No evidence was offered to show that Donell directly ordered or purchased the lime; but the plaintiff below sought to make out his right to recover in the action, by establishing the fact that Donell must have been the general agent of McDonell, authorized to furnish all necessary building materials; or at least from the conduct and acts of the parties, persons furnishing materials had the right

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so to consider him; that Donell knew that the lime had been delivered and used in the building, had seen the account for it, and, in a certain sense, recognized it as a valid claim, and one which his principal would see paid. Daniel Williams, who furnished the lime, and to whom the account sued upon originally belonged, testified that he delivered the lime upon the premises; that he did not see the defendant in regard to it; that defendant was not present to his knowledge, and that Kline, who was putting up the building, authorized him to deliver the lime at McDonell's building. It appears that Kline was the contractor for doing the mason work and furnishing materials. Donell testifies that money was put in his hands by McDonell, to pay Kline on the estimates made by him, for work done and materials on the building; that he always paid it out on Kline's order; that Williams called upon him to pay for the lime; that he told him he had no money, but told him to present the account the next month, &c. He states that he had no authority to purchase materials, and McDonell swears to the same thing.

We express no opinion as to whether the testimony showed that Donell was a general agent, authorized to furnish materials; or, that from the acts and conduct of the parties, he might be so regarded, since the nature, extent and character of the agency was a proper matter for the jury to determine from the evidence in the case. We have made these observations for the purpose of showing wherein we think the county court erred in the instructions given to the jury. And in view of the conflicting evidence upon this point of the case, we think the county judge was not sufficiently guarded in his language, when he instructed the jury, that if they should find that Williams, at the time of the sale of the lime, had reason to believe, from the acts of the parties, that Donell was the agent of the defendant, the defendant would be liable, &c. It would have been more correct to have charged the jury, that if Wil-

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liams, at the time of the sale of the lime, had reason to believe, from the acts of the parties, that Donell was the general agent of the defendant to procure materials, and ordered or received the lime, that then the defendant would have been liable, &c. But this instruction is perhaps not so important as the one following: "That if the jury should find that Donell was the agent of the defendant, then his admissions and declarations would bind the defendant; that if he was acting for the defendant as his agent about the building, although his authority might not expressly extend to the purchasing of materials; still, if the plaintiff's assignor sold to him, believing he was authorized, the defendant would be liable." It is very clear that the admissions and declarations of the agent in reference to a matter upon which he has no right to act, cannot affect the principal. The rule is laid down, that when the acts of the agent will bind the principal then, his representations, declarations and admissions respecting the subject matter, will also bind him, if made at the same time, and constituting a part of the *res gestæ*. 1 Green. Ev., § 113; Story on Agency, § 134, *et seq.*

We have seen that it was admitted on the trial that Donell was the architect employed to draw contracts, make estimates of work done and material furnished, and was authorized by McDonell to pay over to the contractor money on these estimates, as it might be found due. If this was his sole business and duty about the building, the extent and limit of his power, and if he had no authority to contract for, or buy any material on behalf of his principal, then it is obvious that any declarations or admissions made by him on a matter where he has no right to act, could not bind the plaintiff in error. Donell was an agent for a special purpose, and he might have been for a general purpose. But if he was only a special agent, employed for a particular object only, he could not bind his principal by an admission upon a matter entirely outside

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of his agency. This distinction the county judge did not make in the instruction given.

Again, the defendant's counsel requested the court to instruct the jury that the defendant was not liable unless the lime was originally sold and delivered to him; that a promise to pay after the delivery to Kline, in order to be binding, must be in writing, and if the jury should find that the lime was sold by Williams to Kline, then the defendant was not liable to the plaintiff in the action. There certainly was evidence in the case tending to show that the lime was sold and delivered to the contractor Kline. Whether this was actually the fact, was one of the issues in the case. If the lime was really sold and delivered to Kline, then any promise made by the plaintiff in error to pay for it after such sale, was a promise to answer for the debt or default of another, and, to be binding, must be in writing, with a consideration expressed.

It follows, from the view we have taken of this case, that the judgment of the county court must be reversed, and a new trial ordered.

CHAPPELL *vs.* CADY.

ERROR TO CIRCUIT COURT, JEFFERSON COUNTY.

Heard September 20, 1859.] [Decided December 14, 1859.

Agent and Principal—Lien—Factor—Practice—Instructions.

Where an agent has rendered services and advanced money in procuring certain shares of stock and interest scrip to be exchanged for railroad bonds, bearing interest, and claimed a lien upon the bonds for the services and amount expended, *held*, that he was entitled to retain the bonds until the amount due him was paid.

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It is well settled as a rule of law that agents generally have a particular lien upon the property of their principals in their hands for the amount of their advances and services in respect to it. So a bailee has a lien for his services, where the property is enhanced in value by his services rendered upon it.

Where an agent receives one kind of chose in action, or representation of value, to be exchanged for another kind of chose in action, or better security, and he makes the exchange, he does not thereby lose his lien on the security; but for the purpose of the claim and lien it will be considered as the same thing first entrusted to the agent, and that the agent's services and advances have given it an additional value. In such a case the agent may be considered in the light of a factor, and entitled to the rights of such factor.

Where the charge of the court is generally correct, and if a party desire a particular charge given, it is necessary to ask the court to give the instruction desired, or to call the attention of the judge to it; and unless this be done, the appellate court will not notice the neglect.

Lackner vs. Solomon et al., 9 Wis., 129, considered and approved.

This action was commenced to recover four bonds of $100 each, issued by the La Crosse & Milwaukee Railroad Company, for the purpose of retiring $400 of the capital stock of the Milwaukee & Watertown Railroad Company, which the defendant Cady detained. The answer denied the detention and claimed a lien upon the bonds for service as agent in procuring the issuing of the bonds to one Martin Stuifer, of whom the plaintiff purchased them.

On the trial the plaintiff proved the issuing of the bonds to Stuifer who had the shares. They bore 7 per cent. interest, were made payable to Cady or bearer, and delivered to Cady, by the order of Stuifer; also, he proved the sale of the bonds to the plaintiff, and a demand and refusal.

The defendant was sworn as a witness in his own behalf, and testified: In the year 1857 I was engaged in a general agency business in Watertown, in this county. I kept an office, bought and sold real estate, paid taxes on land, paid interest on school lands, and transacted such other business as was entrusted to me as agent for those having business. Stuifer called upon me at my office saying that he owned four shares of stock in the Milwaukee & Watertown Railroad Company, and some interest scrip, which he wished me to look up for him and get them exchanged for bonds of the La Crosse & Milwaukee Railroad Company. I wrote an order for the shares of Stock upon John L. Hathaway, which Stuifer signed, and enclosed it in a letter, with one dollar of

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my own money, paid the postage on the letter and mailed it to John L. Hathaway, Milwaukee. I wrote several letters in relation to the shares of stock before I found them, paid postage on the letters, and made one journey to Jefferson to get one share of the stock, which was in possession of A. Fancel, of Jefferson. I had no other business at Jefferson but to get the share of stock. I hired a team and paid all expenses of the trip. I did not succeed in getting the stock converted into bonds until late in February, 1857. These are the same bonds for which this action is commenced. I charged twenty dollars for my services, and the money I paid out. The plaintiff told me that he had purchased the bonds of Stuifer. I told him if he would get an order for the bonds from Stuifer, and he or Stuifer pay my charges on them, he could have them. Stuifer never directed me to deliver the bonds to plaintiff.

I kept an office for the transaction of business, and Stuifer understood when he employed me that I worked for pay. The procuring of rail road bonds in exchange for rail road stock was in the regular course of my business as general agent. I never held said bonds except as agent for Stuifer, and only retained them for the purpose of getting my pay for services and money paid out, for which I claimed a lien upon them. I have at all times been ready to deliver the bonds to the person entitled to them, on the payment of my fees and charges.

The circuit judge charged the jury: "If the jury find from the proofs that the defendant, as agent of Stuifer, expended labor and money in giving these bonds their present shape and value, and these bonds came into his possession as such agent, the plaintiff cannot recover, unless the proof shows that defendant's lien for such money and labor has been paid, or the amount tendered to defendant before the commencement of this suit. If the jury find from the evidence that the defendant in the course of his business as agent, at the request of Stuifer, who was at the time owner of the four shares of stock, expended money and rendered services in sending forward these shares of stock and getting them exchanged for the bonds of the La Crosse & Milwaukee Railroad Company, and these bonds came into the possession of the defendant in the course of his said agency, then the defendant has a lien upon said bonds for the amount of the money and the value of the services so expended. And the

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plaintiff cannot recover possession of said bonds unless the proof also shows that such lien had been paid or the amount thereof tendered to the defendant before the commencement of this suit. To which charge of the court the plaintiff excepted.

The jury found a verdict for the defendant, upon which judgment has been entered, and upon which this writ of error is sued out.

Enos & Hall, for plaintiff in error.

Williams & Leonard, for defendant in error.

By the Court, PAINE, J. The respondent in this case was a general agent for the buying and selling of real estate, paying taxes, interest, and negotiating such matters as might be intrusted to him. As such, he rendered services and advanced money in procuring certain shares of stock and interest scrip, to be exchanged for bonds of the La Crosse & Milwaukee Railroad Company, for one Martin Stuifer. The bonds were returned by the Company to the respondent; and while in his possession, Stuifer sold them to Chappell, who demanded them, and delivery being refused, brought this suit. The respondent claimed a lien for the money he had advanced in procuring them and the value of his services, and the only question in the case is whether he was entitled to such lien.

The general rule of the common law is well understood, that wherever a bailee has, by his labor, enhanced the value of property intrusted to him, he has a lien for his services. The rule, also, is equally well settled, that agents generally have a particular lien upon the property of their principals in their hands for the amount of their advances and services in respect to it, and this particular lien is favored in law. Story on Agency, ch. 14. Now, it seems to us that the lien claimed here comes within either the one or the other of these rules.

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For, if the property represented by the bonds is to be regarded as the same property previously represented by the stock certificates surrendered, then it may well be said that the services and advances of the respondent imparted an additional value to it. For it was considered by the owner desirable to have the exchange effected. The company wished to retire the stock, and had offered to issue bonds in its place. And when the respondent, acting as an agent for such purposes, hunted up the shares of stock, expending his time and money in doing so, and then at the expense of further labor and money had the stock surrendered and the bonds issued for it, it is evident that he improved the property to whatever extent the bonds were more desirable than the stock; and that they were so, to some extent, must be presumed, from the fact that the owner employed an agent to effect the exchange. But the counsel for the appellant urges that to establish the lien within this rule, the labor must be bestowed on the identical property, and that the bonds cannot be said to be the same property as the stock. Perhaps technically they were not, and yet substantially they were. Suppose an agent takes accounts for collection, and by negotiation obtains better securities, he has made the claim so much more valuable, and his right to a lien ought not to turn upon so nice a question, as whether the new securities are identically the same as the old. Such strict construction would be inconsistent with the favor with which the law regards such claims for lien. And, if it was necessary, we think it would not be going beyond the spirit of the rule upon this subject, to say that the property here was the same interest represented first by the stock and then by the bonds, and that the respondent's services and advances gave it such additional value as it obtained from the change in the mode of representation.

But, if this was not so, then the facts would make the respondent a factor. The shares of stock were then property

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of one kind, intrusted to him as an agent, to exchange or sell, for property of another, the bonds of the company. He made the exchange, and, in doing so, rendered services and advanced money. The property received was in his possession, and his right to the particular lien upon it, given to all factors in such cases, would seem undoubted. It is in accordance with both the dictates of justice and the rules of law. *Hollis vs. Claridge*, 4 Taunt., 807.

We do not think that the testimony of Meyer, that when he demanded the bonds, the respondent said he knew nothing of them, or had not got them, brings the case within the rule that where a party on demand claims no lien, but sets up a claim entirely different, he cannot afterwards rely on a lien. Here the respondent set up no claim whatever, but denied knowing anything about them, if Meyer's statement is true. But the respondent testified, and there is nothing to contradict it, that before the interview with Meyer, he had seen Chappell, told him he had the bonds, and was ready to deliver them on an order from Stuifer and the payment of his charges. It would not seem, after this, as though he could have seriously denied knowing anything about them. But the proper answer to this objection is, that there was no instruction asked upon the point. The charge of the court upon the general question of lien was correct. And although if the plaintiff insisted that the lien had been lost by the respondent's denying knowledge of the bonds, a further instruction might have been properly given upon that subject; yet, none having been asked, and nothing done to call the attention of the court below to the point, the judgment could not be reversed, for the reason that it was not given. *Lackner vs. Solomon & Conrad*, decided at this term, 9 Wis., 129.

The judgment is affirmed with costs.

Dixon, C. J., took no part in the decision of this case, as the same was tried before him at the circuit.

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FOBES *vs.* SCHOOL DISTRICT.

APPEAL FROM CIRCUIT COURT, JEFFERSON COUNTY.

Heard September 22, 1859.] [Decided December 14, 1859.

School Districts—Public Officer—Pleading—Justice of the Peace—Amendment—Schools.

A director of a school district can recover of the district the amount of necessary expenses which he may have been put to, or incurred, in the prosecution, or defense of a suit, brought by or against the district, of which he is an officer, and who is obliged by his office to appear on behalf of such district; but before he can maintain such suit, he must present his account to some district meeting, and give the voters an opportunity of acting upon it, and making provision for its payment.

Where a director of a school district commenced a suit before a justice of the peace, against his district, for expenses, and filed a written complaint, without averring that he had ever presented his account at any school district meeting, or district board, or given the voters any notice of his claim; held, that this complaint was wanting in a material averment, and it was not competent for the plaintiff, under it, to prove a notice to the district.

In actions commenced before justices of the peace, parties will not be held to strict rules of pleadings, unless they resort to written pleadings, in which cases the pleadings must contain all necessary substantial averments.

The cases of *Maynard vs. Tidball*, 2 Wis., 34; *Goodrich vs. Compound School District No.* 5, id., 102; *Philips vs. Bridges*, 3 id., 270; *Lester vs. French*, 6 id., 580, considered and approved.

When the complaint is insufficient, the court will, on a proper application, grant an amendment so as to let in the testimony necessary to the maintenance or defense of an action.

The facts of this case are sufficiently stated in the opinion of the court.

Enos, Hall, & Mulberger, for plaintiff in error.

Gill & Barber, for defendant in error.

By the Court, COLE, J. We do not entertain a doubt but that a director of a school district can recover of such district

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the amount of any necessary expenses which he may have been put to, or incurred, in the prosecution or defense of a suit, brought by or against the district of which he is an officer. The law expressly requires that he shall appear for and on behalf of the district in all suits brought by or against the district, when no other direction shall be given by the qualified voters of such district, at a district meeting. Section 18, chap. 80, Ses. Laws, 1854; same provision in section 17, chap. 19, R. S., 1850. And the legislature could not have intended that if the director paid fees, and incurred expenses in discharging this duty thus enjoined upon him, that he should not have his remedy against the district for money thus expended in its behalf. Such a construction of the statute would be unreasonable, and is not to be adopted. But still, we think, that before an officer should be permitted to maintain an action against a school district for such charges, he ought to present his account at some district meeting, and give the qualified voters an opportunity of acting upon it, and making provision for its payment, otherwise how could the people of the district know any thing about the amount of the claim, or possibly take any proper steps to settle it. As between individuals, it has been held that upon a promise to pay all costs in a suit referred to, there must be, before the action is brought, notice of the amount, and the rule is reasonable *Wright vs. Smith*, 19 Vt. R., 110, and authorities referred to.

The reason is much stronger for requiring an officer of a school district to present his claim, or give some notice of it, at a school district meeting, or to the district board as a condition to maintaining a suit upon it. The qualified voters of the district might be entirely willing to allow the claim, and vote a tax to pay it, and yet could not do so, unless the matter was presented at some district meeting, or some notice thereof given to the district.

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The present action was commenced before a justice of the peace. The complaint was in writing, but contained no allegation that the appellant ever presented his account at any school district meeting, or gave the qualified voters of the district, or the district board, any notice whatever of his claim. The case went up by appeal to the circuit court, and it is not claimed that the appellant, on the trial in that court, offered evidence to show that he had ever presented his claim to any district meeting, or gave the district board proper notice of it before suit brought. Some evidence was offered to show that the district board knew of the existence of the appellant's demand, before the commencement of the suit, and had determined not to pay it. This testimony was objected to as inadmissable under the complaint, no notice being averred, and the objection was sustained. The only difficulty I have had in the case, grows out of the refusal of the court to admit this testimony under the complaint. In several cases, however, passed upon by this court, it has been decided, that in actions commenced before justices of the peace, parties will not be held to strict rules of pleadings, unless they resort to written pleadings, in which cases the pleadings must contain all necessary substantial averments. *Maynard vs. Tidball*, 2 Wis., 34; *Goodrich vs. Compound School District No.* 5, id., 102; *Philips et al. vs. Bridges*, 3 id., 270; *Lester vs. French*, 6 id., 580.

This complaint contains no averment that the appellant had given the school district, or district board, notice of the amount of his demand, which was a material, substantial allegation, and therefore within the principle of the above cases. I think the evidence was properly rejected. It was, undoubtedly, competent for the court to permit the appellant to amend his complaint, so as to let in the testimony offered; but this the appellant did not ask leave to do.

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The order of the circuit court, granting the nonsuit, is affirmed.

DIXON, C. J., took no part in the decision of this case, as the same was tried before him at the circuit.

LANSING'S APPEAL.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard November 16, 1859.] [Decided December 14, 1859.

Referees—Mortgage—Appeal—Arbitration.

Where a referee, appointed by the circuit court, to make sale of mortgaged premises, &c., performed the services, and presented his bill of fees, and upon a disagreement with him and the counsel of the party from whom he claimed, it was stipulated to submit the question of disagreement to the circuit judge, who decided that the amount charged was too large, and gave the referee a smaller sum, from which the referee appealed to this court; *held*, that the decision was not an appealable order; and the appeal must be dismissed.

Where parties submit a matter in dispute to the circuit judge for his decision, the judge in such case acts only as an arbitrator; and although the decision will bind the parties to it, yet it cannot be reviewed on appeal or writ of error any more than the decision of any private individual, to whom the same matter had been submitted.

A judgment of foreclosure had been rendered by the Dane circuit county, in favor of Marshall against Lawrence, and it was referred to R. W. Lansing, to make sale of the mortgaged premises, and to report the same to the court. After the making of the sale, Lansing presented his bill for $20, which he claimed as his fee. This amount was disputed by the counsel for Marshall, and it was agreed to submit the

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matter to the circuit judge for his decision of the amount legally due, who taxed the amount at $3,00, the fee for one day's services. From that decision this appeal is taken.

R. W. Lansing and A. L. Collins, for the appellant.

Smith & Keyes, for the respondent.

By the Court, PAINE, J. The counsel for the respondent claim that this appeal should be dismissed for want of jurisdiction, though no motion was directly made for that purpose, and we think it must be dismissed. The order is not appealable. The orders referred to in section 239 of the code, and which may be brought by appeal to this court, are such as are made in a suit, or special proceeding authorized by statute. This is not such an order. There was no suit between Lansing & Marshall. It was not made in any statutory proceeding to which they were parties. On the contrary, the whole question of dispute was as to the amount of Lansing's fees, as referee for selling certain mortgaged premises. Lansing might have instituted a suit to try the question had he seen fit, or he could have proceeded under sec. 9, chap. 140, R. S., 1858, and had judgment entered, and then it could have been brought here. But instead of that he submitted it by agreement with the counsel for Marshall, to the decision of the circuit judge, who, on such submission, could act only in the character of arbitrator. Having done so, he is bound by that decision. It cannot be reviewed here, any more than could the decision of any private individual to whom it had been submitted in the same way. Under the old system no writ of error would lie upon a judgment rendered by a court in a case submitted to it by agreement. *Alfred vs. Saco*, 7 Mass., 380; *Carroll et al. vs. Richardson*, 9 id., 315; *Bacon vs. Ward*, 10 id., 146, note *a*; *Wellington vs. Stratton*, 11 id., 393;

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and *Johnson vs. Shed*, 21 Pick., 227; *Harrington vs. Harrington*, 15 Geo., 561; U. S. An. Dig., 1855, p. 134, § 16.

In the case of *Wellington vs. Stratton*, the court says: "The principle established is, that when the parties have agreed that a certain judgment shall be rendered for either of them, according to the opinion of the judges on a case stated, the court of errors cannot rescind that agreement, and enter a different judgment. It is the same in principle as if they had agreed that judgment should be entered according to the opinion of any other individuals, or that it should depend on any other collateral event. When the opinion is given, or the other event happens, and the judgment is entered accordingly, it is so entered by the consent and agreement of the parties, in like manner, as if they had in any other mode ascertained what was right and just between them, and had afterwards come into court and consented to a judgment accordingly." This goes much farther than it is necessary to go in this case. For there was a suit, and a judgment actually rendered. But here is no suit, no judgment, no order in any suit, or judicial proceeding. It seems to be no more than the opinion of the circuit judge upon a question voluntarily submitted to his decision; and we cannot review it.

The appeal is dismissed.

Dixon, C. J., took no part in the decision of this case, as the same was tried before him at the circuit.

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ADAMS *vs.* HASKELL.

APPEAL FROM CIRCUIT COURT, JEFFERSON COUNTY.

Heard November 16, 1859.] [Decided December 14, 1859.

Mortgage—Sales—Orders and Decrees—Appeal.

After a sale of mortgaged premises by a referee, the Circuit Court, on the application of the mortgagor, ordered a resale of the mortgaged premises, and imposed other terms than the payment of the costs of the motion; *held*, that if the terms imposed are reasonable and just, the order of the Circuit Court will be affirmed.

The rule of the English courts of chancery, that before the court will open a sale, there must be an offer of a reasonable advance upon the amount bid at the sale, does not obtain in this State; but it rests in the sound discretion of the court.

This was an action to foreclose a mortgage; the defendants appeared and answered, and a trial was had, and judgment of foreclosure rendered against George W. Haskell and Hannah S. Haskell, for the sale of a part of the land named in the bill and mortgage, and judgment against George W. Haskell and Edward W. Haskell for the deficiency, if any, and judgment for Gilbert Allen, another defendant, for his costs.

The sale was made by a referee, at Watertown, sixteen miles from the mortgaged premises, at Jefferson; and the agent of appellants, their attorney, and Allen, started to attend the sale, Allen having agreed to bid up to five hundred dollars for George W. Haskell, and hold the land bid in for his security, and convey to George W. Haskell in one year, upon re-payment of his bid and interest; and Allen had with him the money, and would have been in time for the sale, but their carriage broke down in the woods, and delayed them an hour and a half; so they arrived at Watertown just after the plaintiff had bid in the mortgaged premises, for one hundred and fifty dollars, the same being worth, in cash, five or six hundred dollars. The agent, attorney and Allen immediately applied to the plaintiff and his attorney, and requested them to stipulate to re-open the sale, offering to bid five hundred dollars; and also offered to pay plaintiff five hundred dollars, to apply on the judgment, if he would deed the land to Allen; which offers were declined.

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At the next term, upon affidavits setting forth these facts, and the other papers in the action, the appellants moved the Court to set aside the sale; and upon the hearing of the motion, the Court made the order following, from which this appeal was taken:

"A motion having been made on the part of the defendants to set aside the sale, made in this cause on the 22d day of January, 1859, and after hearing D. F. Weymouth, of counsel for defendants, and Samuel Baird, of counsel for plaintiff, it is ordered that said sale be, and the same is hereby set aside, on condition that within ten days the defendant, George W. Haskell, deposit with Daniel Hall, the referee who made said sale, the sum of five hundred and twenty-nine 68-100 dollars, dollars, as a bid for the said mortgaged premises, at the re-sale thereof, and pay to the plaintiff's attorneys the sum of eighteen and 83-100 dollars, the costs of sale, and costs of this motion. It is further ordered, that if the terms of this order, above mentioned, are not complied with within the time above limited, that then the report of sale, filed in this cause, be and stand, in all respects ratified and confirmed."

D. F. Weymouth, for the appellants.

Baird & Skinner, for the respondent.

By the Court, Cole, J. We think the order from which this appeal is taken, must be affirmed. There is nothing in the case tending to show that the sale was not fairly and legally made, or which created a suspicion that the purchaser, and every person connected with the sale, did not proceed in a fair, upright manner, in making it. It appears that the sale was made at Watertown, and that the agent of the appellants, their attorneys, and one Allen, left Jefferson on the morning of the sale, to go to Watertown, to bid upon the property, Allen had agreed with the agent to bid up to five hundred dollars for George W. Haskell, and to hold the land as security for the re-payment of his bid and interest, within a year; but in consequence of the carriage breaking down, these parties did not reach Watertown until after the sale had

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taken place. This was an unavoidable accident, for which no one connected with this case was probably responsible; so there was really no legal objection to confirming the sale. But the Circuit Court, upon application, thought proper to order a re-sale, upon the conditions named in the order. This was a very sound exercise of discretion, under the circumstances, and we think the terms imposed reasonable and just.

The counsel for the appellants insists that the court should have imposed no terms, except the payment of costs and interest. Had the court ordered a re-sale upon such terms and conditions, the purchaser might well have said they were not just and equitable. The practice of the English Court of Chancery, to open biddings upon a master's sale, before the confirmation of the report, upon the offer of a reasonable advance upon the amount bid, has not obtained in this country. *Duncan vs. Dodd*, 2 Paige, 99. Here the sale is only set aside in special cases, and then upon such terms as the court deems right and proper.

The order of the Circuit Court is affirmed.

DIXON, C. J., took no part in the decision of this case, as the same was tried before him, at the Circuit.

STARKWEATHER *vs.* HAWES et al.

APPEAL FROM CIRCUIT COURT DANE COUNTY.

Heard September 22, 1859.] [Decided December 14, 1859.

Constitutional Law—Mortgage—Sales—Practice.

The act of the legislature, dated 15th May, 1858, relating to the foreclosure of mortgages, commonly called the "Mortgage Stay Law," is constitutional.

The case of *Von Baumbach vs. Bade*, 9 Wis., 597, considered and approved.

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Starkweather vs. Hawes et al.

An act of the legislature which regulates the manner in which sales should be conducted, under judgments already rendered, is not obnoxious to the objection that the legislature has assumed judicial power.

The court below has power to set aside a sale, and also a confirmation of the sale by the court, upon a proper application, made for that purpose.

This was an action brought to foreclose a mortgage, and comes to this court on an appeal from an order of the court below, affirming an order of the judge of said court at chambers, setting aside the sale, order of confirmation of sale, and subsequent proceedings. The judgment of foreclosure was entered April 10th, 1858, and the sale was made June 2d, 1858, and confirmed on the 10th of June, 1858.

On the 9th of August the attorneys for the defendants served on the attorneys of the plaintiff, an order of the judge of the circuit court, to show cause before him, on the 11th of August, why the sale, and the order confirming the same, should not be set aside and vacated for irregularity, in that the sheriff sold, without advertising six months, as required by law, and on the ground of the inadequacy of the price with costs of motion, and that a copy of this affidavit, and a copy of this order, be served on the plaintiff's attorneys, at least one day before the time herein fixed for showing cause.

This order was based upon an affidavit of Jacob Kniffin, one of the defendants, which set forth that "this was an action against deponent and others to foreclose a mortgage, and that this defendant, and A. W. Doren, one of the other defendants herein, gave a subsequent mortgage upon said property mentioned in this case, and that they have been sued by the plaintiff in this case, upon notes which said mortgage was given to secure, and the mortgaged premises in this case were sold on the 2d day of June last, for about $900, and were worth, at that time, at least $5000, and that said order has been confirmed, but no notice was given of said order, or motion for confirmation, and deponent had no knowledge of the sale or confirmation until since the commencement of the suit on said notes, and further, that the mortgage given by deponent and Doren on said land, was the next incumbrance on said land, after this mortgage in this case."

This motion was heard on the 22d of August, when the judge made the following order: "On reading and filing affidavits, on inspecting the records and files of the court, and on reading the order to show cause, &c., and after hearing

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Mr. Hopkins, of counsel for the defendants, Kniffin & Doren, and after hearing S. Crawford, for plaintiff, it is ordered that the sale of the mortgaged premises in this case, and all subsequent proceedings in this action based thereon be, and the same are hereby set aside, with ten dollars costs of this motion, to be paid by the plaintiff, and that the clerk of this court enter this order of record. A. L. COLLINS."

From this order the appellant took an appeal to the general term of the said court, and upon the hearing of said appeal the following order was made by the court:

"This cause having been brought on, on the appeal from the order setting aside the sale, &c., in this case, and after hearing Mr. Hopkins, for the respondent, and Mr. Wakeley for the appellant, it is order that said order be, and the same is hereby affirmed, with five dollars costs of this appeal. By the court. L. S. DIXON."

From this order an appeal was taken to this court, and the appellant asks that the same may be set aside and reversed.

Wakeley & Tenney, for the appellants.

J. C. Hopkins, for the respondent.

By the Court, PAINE, J. The main ground relied on to reverse the order appealed from, is that the law of 1858, known as the "Mortgage Stay Law," was unconstitutional. We have held otherwise, in the case of *Von Baumbach vs. Bade*, decided at this term, 9 Wis., 597, and as the law expressly applies to cases in which judgments were rendered before its passage, it was applicable to the sale set aside by this order.

We do not think the act is liable to the objection that the legislature has assumed judicial power, in regulating the manner in which sales should be conducted, under judgments already rendered. The manner in which such judgments shall be executed, remains liable to legislative control.

Neither do we think it material to determine whether a

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judge at chambers may set aside a sale that has been confirmed by an order of the court. For an appeal is first taken from the judge at chambers to the circuit court, and it can be brought here only from the order of the court. The court here thought the sale should be set aside, else it would not have affirmed the order of the judge. And we are reviewing only the action of the court.

The order is affirmed, with costs.

PLATT *vs.* ROBINSON.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard September 23, 1859.] [Decided December 14, 1859.

Answer—Interest—Usury—Frivolousness of Answer, &c.—Reference—Practice.

An answer to a complaint for foreclosure which set up that the note on which the action was brought was usurious, but did not aver an offer to pay the amount borrowed, nor tender the same with the answer, is not for that cause frivolous' but such answer is a good defense to the action, and it is error in the circuit court to enter judgment upon such an answer, under section 159 of the Code.

Where a defendant answered that the note on which the action is brought is usurious under sec. 2, chap. 55, 1856, the defendant is not obliged to prove a tender of the amount of the principal sum loaned, &c., until it has been determined that the facts of usury set forth in the answer are true, and the defendant shall demand the benefit of the determination.

Where a notice of application for judgment under section 159 of the Code, for frivolousness of the answer, was given for the 25th of May, at the opening of the court, on that day, &c.; and on that day the court was not in session, the application may be made on the next motion day, without further notice.

The court may refer a note and mortgage to a referee to compute the amount, &c. before entering judgment under section 159 of the Code, and is not necessary that notice of the time, &c., when the referee will examine and compute the amount, need be given to the defendant, whose answer has been declared frivolous.

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The facts in this case, as to the matters of the complaint and answer, and the entry of judgment, are stated in the opinion of the court. The judgment interlocutory and order of reference was made on the 8th of June, 1858, who reported the matter back, and final judgment was entered on the same day.

The order entering judgment for frivolousness of the answer, and referring the note and mortgage to Coit was served upon the defendant's attorney on the 9th of June, and after the referee had acted in the premises; but no notice of application for reference, or any notice, after the order of reference had been made, when the referee would act, nor any notice what his report was, before the entry of judgment, was ever given the defendant Robinson, who appeared and answered herein.

From which judgment, and all orders made prior to the judgment, necessary to sustain and support said judgment, the appellant, William Robinson, impleaded with Elizabeth Robinson his wife, appeals to this court, and prays that the same may be reversed and held for naught.

Knapp, Widvey & Booth, for the appellants.

Stevens & Lewis, for the respondent.

By the Court, Dixon, C. J. This is an action commenced in the circuit court for the county of Dane, by the respondent, against the appellant, and Elizabeth Robinson his wife, for the foreclosure of a mortgage. The complaint is in the usual form, and alleges that the appellant, on the 7th of May, 1856, at Black Earth, in the county of Dane, executed and delivered to the respondent his promissory note for the sum of $600, payable on or before the 7th day of May, 1857, with interest at the rate of twelve per cent. *per annum*, and at the same time and place, together with his wife, executed and delivered the mortgage to secure the payment of the note. Elizabeth Robinson made no answer. The appellant answered, admitting the execution of the note and mortgage as set forth in the complaint, but insisting that the appellant ought not to have

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the judgment claimed in the complaint, because the note and mortgage, although calling for the payment of $600 and interest at 12 per cent., was in fact given for a loan by the respondent to the appellant, of the sum of $570, and no more, which sum was so loaned at the date of the same; and that the making of the said note and mortgage for the sum of $600 and interest as aforesaid, was a violation of the provisions of the statute limiting the rate of interest.

For a further answer, he alleged that before the making of the promises and undertakings in the complaint mentioned, wit: On the 7th day of May, 1856, at the county of Dane, it was corruptly and against the form of the statute in such case made and provided, agreed by and between the respondent and himself, that the respondent should lend and advance to him the sum of $570, and that he should forbear and give day of payment thereof to him until May 7th, 1857, being the term of one year, and that he, the said appellant, for the said loan of $570, and giving of such day of payment, should give and pay the respondent the sum of $600 on the 7th of May, 1857, with interest on said last sum at the rate of 12 per cent. per annum; that in pursuance of said usurious and corrupt agreement, the respondent did then and there lend and advance to him the sum of $570, and no more, and the sum of $600 so agreed to be paid and given by the appellant to the respondent, and secured by the note and mortgage mentioned in the complaint, exceeds the rate of twelve dollars for the forbearance of one hundred dollars for one year, &c., whereby, and by force of the statute in such case made and provided, the note and mortgage became and were wholly void as to all sums above the said sum of $570, so actually loaned.

On the 15th of May, 1858, the respondent's attorneys gave notice to the attorneys of the appellant, that, on the 25th of May, at the opening of the court on that day, or so soon thereaf-

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ter as counsel could be heard, the circuit court for said county being then in session, application would be made to the court to declare the answer frivolous, and for judgment thereon, or for such other or further relief as might be just. On the 22d of May the court adjourned until the 31st, and on that day until June 1st, without opening to attend to business. From the 1st until the 5th, no opportunity was afforded to make the motion, by reason of the refusal of the court to entertain the same. On the 5th it was submitted by the respondent's attorneys, no one appearing to oppose; on the 7th, granted by the court, and on the 8th, judgment perfected. Upon the order declaring the answer frivolous and for judgment thereon, being made, an order was also made referring it to a court commissioner to ascertain and compute the amount due upon the note and mortgage, and report the same to the court. Upon the coming in and confirmation of his report, which was in the usual form, judgment was entered.

To these proceedings several objections are made by the appellant's counsel. 1. It is objected that the judgment upon the answer as frivolous, is erroneous, because no notice of the time when the application therefor was in fact made, was given to the appellant's attorneys. Whether this objection be good or not, depends upon whether it was regular for the respondent to proceed after the 25th of May, and during the same term, under the notice of such application, which was given for that day; or whether the court not being in session on that day so that it became impossible for him to make his application then, he was bound before he could proceed further, to give a new notice of the time when he would make the same. The appellant's counsel insists that the notice for the 25th expired with that day, and that before further steps could be taken it must be renewed. We are of a different opinion. It seems to us that when causes over which the moving party has no control, intervene between the time of

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the giving of notice of a motion and the time of hearing, which render it impossible for him to proceed at the time fixed, and of which causes, such as the adjournment of the court, in the present instance, the opposite party is bound equally with him to take notice; the notice already given ought to be regarded as sufficient to enable him to proceed under it, at the next motion day when it can be heard, and to compel the opposite party if he desires to oppose it, to be present at such day. Such we believe has been the usual understanding and practice in the circuit court, and there appears to be no hardship or injustice in it. In the state of New York from which we derive most of our notions of practice, proceedings upon motions in almost every contingency, are regulated by rules of court. With us it is not so. In the absence of such rules they must, to a great extent, remain matters of discretion with the courts. The rule adopted by the Supreme Court of New York in the Anonymous Case and note, 2 Wend., 621, appears to be as fair and as little productive of surprise and mischief as any which can be pursued. It was to allow the moving party the entire day fixed by the notice, to make his motion, but not afterwards; and in case he did not do so, and the opposite party appeared to resist it, to dismiss it, on his application at the next motion day, with costs. This rule would of course be subject to such exception as that contained in the present case, and to a power of continuance on the part of the court.

2. The next objection made is, that it was erroneous to refer the matter for computation of the amount due after judgment for frivolousness, to the court commissioner. This was clearly regular within the second subdivision of sec. 158 of the Code, which provides that, "if the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose."

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3. The third objection is, that the answer is not frivolous. On this point we are of opinion that the judgment must be reversed. The only ground of frivolousness urged against the answer is, that it does not aver or show a tender to the respondent of the principal sum loaned, and many authorities are cited from New York and elsewhere, to show that such averment is necessary. No general proposition is better settled than that when proof of tender is necessary either to establish a cause of action or to sustain a defence it must be preceded by a proper averment in the pleading. If this case fell within the general rule there could be little doubt about it, but it seems to us that it does not. Whether it does or not depends entirely on the statute. Its phraseology is peculiar. The 2d section of the act, chap. 55, Laws of 1856, the first section having provided that all bills, bonds, &c., shall be valid and effectual to secure the repayment of the principal sum loaned, provides that, "whenever any person shall apply to any court in this state to be relieved in case of a usurious contract or security, or when any person shall set up the plea of usury in any action or suit instituted against him, such person, to be entitled to such relief or the benefit of such plea, shall prove a tender of the principal sum of money or thing loaned to the party entitled to receive the same." The prior act of March 10, 1851, chap. 172, Laws 1851, to which this act was amendatory, made all bills, bonds and other contracts, "whereupon, or whereby there was reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or value for the loan or forbearance of any money, goods or other things in action," than twelve dollars upon one hundred dollars for one year, absolutely void; and imposed no restraints whatever upon the maintenance of actions to set aside such contracts, or the pleading of such usurious agreement, as a defense to suits brought to enforce them. It seems very clear, taking the two acts together and considering the form

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of expression adopted by the legislature in the second section of the act of 1856, above quoted, that it was not their intention to change or modify the existing rules of pleading or mode of commencing suits, but to provide that no relief should be granted by the court upon any such action brought, or plea set up, unless the party entitled to such relief should, at the time of making his application, show that he had complied with the equitable rule which requires that he should pay, or tender the sum he had actually received. The entire scope of the section appears to be to the effect that actions are to be brought and defenses made according to the existing practice, but that when the cause of action as stated in the complaint, is proven, or defense set up in the plea is established by the decision of the court, judgment for such relief, or the benefit of such plea shall not be granted without proof of a tender first being made. It inhibits the court from granting the relief without proof of tender made. The language employed seems to us so strongly to support this conclusion as hardly to admit of doubt or argument. It follows from this view, not only that the answer is good, but that the appellant is not obliged to prove a tender until it has been judicially determined that the facts set forth in it are true, and he demands the benefit of such determination.

The judgment of the circuit court must be reversed and the cause remanded for further proceedings in accordance with this opinion.

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KELLOGG *vs.* SMITH.

APPEAL FROM CIRCUIT COURT, OUTAGAMIE COUNTY.

Heard September 27, 1859.] [Decided December 14, 1859.

Appeal—Practice—Order and Decrees.

Where an appeal is taken from an order "denying a motion made to set aside, and strike from the file the judgment roll," and the record showed no such order was made by the circuit court, the appeal will be dismissed.

The facts in this motion can be gathered from the opinion of the court.

R. P. Eaton, for appellant.

F. Packard, for respondent.

By the Court, Cole, J. The appeal in this case must be dismissed. The notice of appeal states that the appeal is from an order of the circuit court of Winnebago county, made on the 7th day of April, 1859, "denying a motion made by said defendant to set aside and strike from the file the judgment roll." We find no such order in the return of the clerk. The return shows an order made on the 7th of April, 1859, in this cause, in which it was ordered that the amended complaint be struck from the files, with leave to the plaintiff to re-file and re-serve the same on the payment of the costs, theretofore ordered and taxed with five dollars in addition, within twenty days.

Whatever the appellant's intention might have been, he does not seem to have taken any appeal from this latter order; at least, the record does not show that he has. And since the order described in this notice of appeal has not been returned by the clerk, it is clearly not before us for examination. No other course is left but to dismiss the appeal.

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CLARK *vs.* CITY OF JANESVILLE.

APPEAL FROM CIRCUIT COURT, ROCK COUNTY.

Heard October 19, 1859.] [Decided January 4, 1860.

Corporations—Constitutional Law—Assignments—Coupons—Construction of Statutes—Publication of Laws.

The courts will construe statutes, as all written instruments are construed, by the surrounding circumstances, the condition of things, the evils to be remedied, and the objects to be obtained. Beyond these they will not go.

Where the charter of a city empowered the common council, by an ordinance, to submit to the voters of the city, the question whether the city should subscribe for stock in a railroad, and issue its bonds, and that ordinances be published before taking effect, &c.; and the ordinance authorizing the submission and the notice of the election, were both contained in the same newspaper; held, that such notice was legally published.

Where a city had issued bonds, with coupons attached, which had passed into the hands of *bona fide* purchasers for value, the city cannot defeat an action on the coupons, by showing that the election authorizing the issuing of them, was not regular.

Bonds, with coupons attached, issued by a corporation, are intended to be thrown into the market and sold, and it would be an inequitable rule to hold that they were void in the hands of a *bona fide* purchaser, on account of some defect in the notice of election, or some slight irregularity in conducting the same (per COLE, J.)

Where the right of the common council to authorise the mayor of a city to subscribe for stock in a railroad company, depended on a vote of the electors of the city, and the bonds are issued, the presumption is, that the city authorities proceeded according to, and complied with all the provisions of law. (Per COLE, J.

The bonds issued by the city of Janesville, were made payable to the railroad company or its assigns, and the coupons attached were payable to the railroad or bearer; and the bonds were assigned to ——— or bearer, and sold by the railroad. These securities are designed to be thrown upon the market for sale, to raise money upon, to pass from hand to hand by delivery, and by common usage are so passed; and, though they are not, strictly speaking, commercial paper, like bill of exchange, &c., yet they circulate in market much like these instruments, and are intended to answer the same purpose; therefore, being transferred by assignment and delivery, a complete title is conferred upon the

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holder, relieved from existing equities, at the time of the assignment between the maker and the assignor. (Per COLE, J.)

A suit may be maintained upon the coupons without the production of the bonds to which they have been attached; but in this case, as the action is brought by the holder and owner of the bonds, he is entitled to recover. (Per COLE, J.)

A statute, authorizing a municipal corporation to issue bonds, &c., is a public law; and a purchaser of such bonds is bound to see that the authority to issue them existed; but though the exercise of the power is made to depend upon an election, he is not bound to inquire into the regularity of the election. He may presume that the preliminary steps have been taken according to law; nor is he bound to inquire into the existence and regularity of those steps.

The rule that parties dealing with officers of corporations are bound to know that they have authority to act, though proper for the protection of those whom the officers represent, is not to be carried so far as to destroy the safety and rights of those who with good faith and due diligence deal with the corporation.

Where the act, in pursuance of which bonds are issued by a city, is a public statute, the person dealing in them is chargeable with knowledge of the existence of the act. If it appears that the act has not been published, and is not in force, the authority to issue the bonds does not exist.

If a city is authorized to subscribe for stock of a railroad company, and issue its bonds to the company for the stock, it cannot defeat an action on the bonds, on the ground that the company's charter did not authorize it to receive the bonds in payment for stock. The power to issue the bonds for the stock, carries with it the incidental power to receive them by the company, and issue the stock therefor, without an express authority in the company's charter for that purpose.

Though the charter of a railroad company only authorized it to receive subscriptions to its stock, upon installments payable at call, yet if a municipal corporation is afterwards authorized to subscribe for the stock of the company by a loan of its credit, the railroad company thereby becomes authorized to receive the loan, and the act allowing the subscription, works a modification of the railroad charter to that extent. (Per COLE, J.)

Sections 3 and 10, Art. VIII., of the constitution of Wisconsin, which provides that "the credit of the state shall never be given or loaned in aid of any individual association or corporation," and that "the state shall never contract any debt for works of internal improvement, nor be a party in carrying on such work," &c., are limitations upon the power of the state itself, and not a prohibition upon the legislature to authorize counties, towns, and cities, to loan their credit, or contract debts for works of internal improvement.

Section 3, Art. XI., of the constitution of Wisconsin, expressly recognizes the power of municipal corporations to loan their credit, and requires the legislature to restrict it.

The constitution did not intend to prohibit the legislature from allowing counties, towns and cities to loan their credit to works of internal improvement, but to

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permit that power to be exercised under such restrictions as to the legislature might seem proper. (Per COLE, J.)

The legislature authorized the mayor of the city of Janesville, to subscribe $150,000 for stock in any railroad running to, or passing through the city. If the common council should submit the question whether the stock should be taken to the electors of the city, and a majority should vote in favor of the subscription, and then the council should pass a resolution that the mayor might subscribe, &c. These provisions are sufficient restrictions under the constitution upon the power of the city to loan its credit for works of internal improvement. (Per COLE, J.)

The object of the prohibition in section 10, Art. VIII., of the constitution of Wisconsin, against the state contracting any debt for works of internal improvement, or being a party to carrying them on, does not require counties, towns, and cities to be included in the prohibition. It was to prevent the state from becoming a party to them, not to prohibit the works from being carried on.

The prohibitions in Art. VIII. of the constitution of the state of Wisconsin, were not designed to protect the citizens of the state from taxation, for purposes of internal improvement, but to prevent the state from being a party to such works.

The constitution gives the power to the legislature to adopt such restrictions as may be necessary, to prevent the evils which may result to counties, towns, and cities, if allowed to engage in public works, and tax the citizens therefor. The remedy for abuses under such power is to be found in the wisdom and integrity of the people, not in the restrictions of the constitution.

Section 1, Art. XI., which provides that corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws," is not a prohibition against investing a municipal corporation with authority for any purpose.

Whether the construction of a railroad beyond the corporate limits of a city be a municipal purpose or not, is discussed but not decided.

The case of *The State ex rel. Cothren vs. Lean*, 9 Wis., 279, considered and approved.

The charter of the city of Janesville is a general law, within the provision of Art. VII., § 21, of the constitution of Wisconsin, which requires that "no general law shall be in force until published." The words, "general law" as here used, have the same meaning as *public act*, in the ordinary acceptation, and they are convertable terms. (COLE, J., dissenting.)

The words "general law," in §§ 1 and 4, Art. XI., of the constitution, are clearly used as opposite to *special*, and without any design of indicating the public or private character of the law. The whole object and scope of the restriction are aimed at special legislation. (COLE, J., dissenting.)

In § 21, Art. VII., the words "general law," are not used as contra-distinguished from local or "special," but they are used in their usual meaning of public. COLE, J., dissenting.)

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The object of § 21, Art. VII., was to protect the people from the effect of laws which they had no means of knowing, and yet are bound to take notice of.

Laws are public or private, not because of convenience in pleading them, or because courts take notice of them; courts and every body else are bound to take notice of certain laws, because they are public.

The charter of the city of Janesville is a general law, within the provision of Art. VII., § 21, of the constitution, and was not in force until published under and by authority of law. (COLE, J., dissenting.)

A publication of an enactment of the legislature in an unauthorized manner, although it may give notice to the people to be affected thereby, is not such a publication as is required by the constitution to give it efficacy.

The charter of the city of Janesville, authorizing a vote to be taken on the question of issuing bonds to aid in the construction of a railroad, was published in the private acts, and the certificate of publication attached to the volume was dated October 4, 1853; held that the charter was first published by authority at the date of the certificate, and that it did not authorize the common council to pass an ordinance, and the people to vote on the question in July, nor the counsel to issue the bonds in August, previous to the authoritative publication. Every person taking these bonds, is chargeable with a knowledge of this want of authority. (COLE, J., dissenting.)

This was an action commenced by Clark against the city of Janesville, to recover the amount due upon a city bond, and the coupons attached. The judgment from which the appeal was taken, was entered upon over-ruling the demurrer to the complaint.

After averring that the city was a municipal corporation, duly incorporated, and that the Rock River Valley Union Railroad Company was a body corporate and politic, duly organized, the complaint set forth, that on the 18th of June, 1853, the common council of the city passed an ordinance, providing for the submission of the question, whether the city of Janesville shall take stock to the amount of $150,000, in the R. R. V. R. R. Co. The ordinance provided that the election should take place on the 5th of July, 1853, prescribed the form of the ballot, the inspectors of the election, the canvass and return of the election, and places of the election, and also for the publication of the ordinance. On the 22d of June the ordinance and notice of the election were published in a newspaper of the city. This was done in pursuance to the provisions of sec. 7, chap. 4, of the "Act to incorporate the city of Janesville," approved March 19, 1853. That upon the submission of the question to the electors, a majority of the votes were cast in favor of taking the stock; and that on

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the 9th of July, the common council, by resolution entered in their minutes, authorized, directed and instructed the mayor of the city to subscribe for $150,000 of the stock of the railroad company, pursuant to the act. On the 10th of July the mayor subscribed for the city, in the stock book of the company, the $150,000. On the 1st of August, 1853, the common council issued 70 bonds of the city, with coupons attached, drawing ten per cent. interest, to pay for the stock so subscribed. The following is a copy of one of these bonds, and of the coupons attached:

State of Wisconsin. United States of America. Janesville, July 1st, 1853.

$1,000 No. 1.

JANESVILLE CITY SCRIP.

This certifies that the city of Janesville is indebted to the Rock River Valley Union Railroad Company on the principal sum of one thousand dollars, payable to said company or its assigns, at the end of twenty years from the 1st day of July, in the year one thousand eight hundred and fifty-three, with interest at the rate of eight per cent. per annum, payable semi-annually in the city of New York, on delivery of the interest warrants hereto annexed, as they shall respectively become payable, until said principal sum is fully paid.

In testimony whereof, and pursuant to a vote of the common council and citizens of the city of Janesville, in a city meeting duly notified and held for that purpose, I, A. Hyatt Smith, mayor of said city, hereunto subscribe my name and cause the seal of said city to be affixed.

Dated at Janesville, July 1st, 1853.

Subscribed and sealed this 1st day of August, 1853.

[L. S.] A. HYATT SMITH, Mayor.

Countersigned by

J. W. Hobson, Treasurer.

Registered in the office of the city clerk, this 16th day of August, 1853. Jas. H. Ogilvie, City Clerk.

For value received, the Rock River Union Valley Railroad Company assign the above bond to ———, or bearer, and promise that the interest and principal sum thereof shall be paid in the city of New York on the surrendering of the annexed interest warrants and of said bond, as they respectively become payable.

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In testimony whereof, said company have caused their seal and the signature of their president to be hereto affixed at their office in Janesville, this first day of August, A. D., 1853.

[L. S.] A. HYATT SMITH, President.

No. 2. Interest Warrant for forty dollars, ($40.)

On the 1st day of July, 1854, the city of Janesville, Wis., will owe and will pay to the Rock River Valley Union Railroad Company, or bearer, forty dollars, being for the half yearly interest on city certificate No. 1, for one thousand dollars, payable in the city of New York.

J. W. HOBSON, Treasurer.

The complaint then averred these bonds were duly delivered to the railroad company. On the same day, the 1st of August, 1853, the president of the company, A. Hyatt Smith, under the corporate seal of the company, assigned the bonds, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 50, 61 and 62, with the coupons, to ———, or bearer," and delivered them to the plaintiffs, for value received; and thereby they became and were the owners and holders of the same. That the interest upon the coupons Nos. 2, 3, 4, 5, 6, 7, and 8, attached to each, became due respectively on the 1st of July, 1854, 1st January, 1855, 1st July, 1855, 1st January, 1856, 1st July, 1856, 1st January, 1857, and 1st July, 1857, for forty dollars each, and claimed judgment for the amount, with interest and damages, at ten per cent.

The defendants demurred generally, that the complaint did not contain facts sufficient to constitute a cause of action.

The circuit court overruled the demurrer, and from that order this appeal was taken.

The city of Janesville was incorporated by an act of the legislature of this State, approved March 19, 1853, and was organized under a city government in April of the same year. Section 7, of chap. 4, of the charter is as follows:

"The common council of said city shall have power to submit to the legal voters thereof, the question whether said city shall take stock in any railroad running to or passing through said city, by giving, in some newspaper published in said city, at least ten days notice of the time and place of deciding said question, and stating in such notice the amount to be subscribed. The question shall be decided by ballot, those

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in favor of taking stock, voting 'for taking stock,' and those opposed, voting 'against taking stock.' If a majority of the votes cast on such question be in favor of taking stock, then the common council shall, by resolution, to be entered in the city records, authorize the mayor to subscribe for the city, the amount of stock so voted to be taken. When such stock is subscribed, said city shall have the same powers and privileges, and be subject to the same liabilities as other stockholders in such company, excepting only the reservations and agreements made by said common council, with the directors of such railroad company.

"Sec. 9. The common council shall have power to issue the bonds of the city, with coupons or interest warrants attached, drawing not more than ten per cent. interest, to pay the stock so subscribed, and shall have power to levy a special tax on the taxable property in said city, to pay the interest on such bonds, and also the principal, when the same may become due; but the common council shall not have power to dispose of such bonds for less than the face thereof.

J. A. Sleeper, for the appellant.

The city of Janesville is a municipal corporation, created by law of the legislature of this state, deriving all its power to act from its charter, and can do no legal or binding act unless authorized thereby. The charter gave power to the common council to submit the question of taking stock in any railroad running to or passing through the city, and when, upon a submission of that question, in pursuance with the provisions of its charter, the legal voters in the city, by a majority should determine on taking stock, the council could authorize the mayor to subscribe the stock in behalf of the city. Unless the complaint shows a compliance with the provisions of the charter, upon the subject of taking stock and issuing these bonds, it does not show that they were issued by authority of law, nor that they were binding on the city. The complaint does not show that ten days notice was given of the time and place of deciding the question of taking stock.

1. The ordinance passed by the common council does not fix the place of the submission of the question as required by the charter. There could be but one place in the city where votes were to be cast and received. Or if I am wrong in this, then it is clear that saying that the place of holding

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the polls in the 4th ward should be the place of last election, is not fixing a place for deciding the question of taking stock within the meaning of the charter.

2. The notice is equally defective, and for the same reasons as the ordinance.

3. There was no proper publication of the notice, for the reason that the ordinance directing the publication of the notice was not in force until after it had been published, and until it was published was no authority for the clerk to publish the notice. Sec 4, chap. 4, of the charter. The allegation in the complaint is: "Which ordinance was duly published on or about the 22d day of June, 1853, in the Democratic Standard, then the official paper of the city of Janesville. That afterwards, and on or about the said 22d day of June, 1853, the said common council did, in pursuance of the aforesaid ordinance, publish in the Democratic Standard, a newspaper published in said city, a notice, &c. Now, it is not certain when the ordinance was published, nor when the notice was published; but it is manifest that they were published on the same day, for the same language is used in reference to both, and as the authority to publish the notice is conferred on the clerk by the ordinance; and that being the only evidence of the action of the common council on the subject, it is apparent that there was no legal publication or giving of notice, because the common council had not as yet authorized it to be given.

4. The complaint does not show that there ever was a vote cast upon the question; it is remarkably silent on that subject. After alleging that by the ordinance and notice the common council submitted the question, it goes on to allege that a majority of the votes cast were in favor of taking stock; but nowhere does the complaint allege that there was an election held, or that the people voted on the question. Saying "that upon the said submission a majority of the votes cast were in favor of taking stock," is not saying any votes were cast upon the question.

Now all these matters are material; they are matters of substance which must appear on the face of the complaint before the court can see that the common council could legally issue the bonds described in the complaint. It is obvious that they could only be issued upon authority given by the legal voters, in the manner prescribed by the charter; and if they had never authorized the subscription of the stock, there

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would be no payment to be made for stock, and the railroad company could not, nor did it acquire any interest in the bonds, and could not enforce payment of the amount secured. These bonds are all payable to the R. R. Co., or its assigns, and the plaintiffs took them and hold them subject to all defenses which could be urged against them if they were still held by the railroad company, and are bound to show in their complaint, that they were issued by legal authority, just as much as the R. R. Co. would be bound to, were it plaintiff in this action.

The plaintiffs have failed to show that the preliminary steps required by law, were taken to authorize the subscription to the stock of the railroad company by the city, and consequently, the bonds were issued and delivered by the common council to the railroad company, without any authority, and are void. The railroad company were bound to know the power of the common council to issue these bonds; and in contemplation of law, it did know that it was acting without any power. The president of the railroad company was mayor of the city, and in those capacities, knew for both parties, all there was done in the matter, and his knowledge is binding upon the railroad company.

These bonds are all made payable to the Rock River Valley Union Railroad Company or its assigns; and were delivered to the railroad company, on or about the 1st day of August, 1853, the day when they were actually sealed.

The Rock River Valley Union Railroad Company was incorporated by the name of Madison and Beloit Railroad Company, Laws of 1848, p. 161, and its name changed in 1850, Laws 1850, chap. 219, to "Rock River Valley Union Railroad Company." By the charter of this railroad company, sec. 3, the capital stock of the company is divided into shares of one hundred dollars each, and five dollars are required to be paid on each share at the time of subscribing.

Sec. 6 is as follows: "The directors may receive payment to the subscriptions to the capital stock at such time in such proportion, not exceeding twenty-five per cent. at any one instalment, under such conditions as they shall deem fit, under the penalty of forfeiture of all previous payments thereon, or otherwise: provided, they shall never require the payment to be made at any place out of the counties through which the road shall pass; and such directors shall, at least thirty days previous to the appointed time of such required payment, give no-

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tice thereof in the manner provided in the fourth section of this act, for giving notice of the opening of books of subscription for the stock of said company." This section has not been changed, except that the amount of the capital stock has been increased almost indefinitely. The requirement of the payment of five dollars on each share, at the time of subscribing, is still in force, and was a prerequisite, and necessary to be done, when the subscription to the stock of the railroad company was made by the city. All the provisions of section 6, and indeed, every word of the charter, of the company, entered into the contract and became a part of it, and if that contract of subscription in any way conflicted with the charter; if the railroad company entered into any contract with the city, either prohibited or not authorized by its charter, it has exceeded its powers, acted without authority, and as to it, the whole transaction is null and void; and, as there must be mutuality in every contract, it follows if the railroad company was not bound, the city incurred no obligation in subscribing for the stock, nor in delivering its bonds to pay for the stock for which it subscribed, but which it could never hold or possess under the contract, because of the want of power of the railroad company to enter into the contract with the city. These bonds were issued to pay for stock subscribed in the R. R. V. U. R. R. Co., by the city; they are payable to the R. R. Co., or its assigns, in twenty years, in the city of New York; they are upon eight per cent. interest, payable semi-annually in the city of New York, the interest warrants or coupons being payable to bearer. Being issued to pay for stock in that railroad company, and payable and delivered to it, it is obvious that a credit was given by the railroad company to the city for twenty years, upon its subscription to the capital stock of the company, and when that term of credit had expired, the terms of the contract required payment of the whole sum subscribed, and not that only, but required that payment be made in a place out of all the counties through which the road runs; and not only that, but in a foreign state. Nor is that all. This credit was given by the railroad company in consideration that the city would, every six months, pay it, in addition to the one hundred dollars on each share subscribed, four dollars, by which the city, at the end of the time when it was required to complete the payment for the stock subscribed, would have paid for each share subscribed, the sum of two hundred and sixty dollars. This

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contract the railroad company, by its charter, was not authorized to make. It had no power to receive subscriptions to its stock under an agreement that it should be paid for in anything but money. It had power to fix the time and the proportions, when and in which, payments to the stock should be made; but it could not require more than twenty-five per cent. to be paid at any one time. Nor could it affix any penalty for non-payment, other than a forfeiture of all previous payments. It could not, as a penalty for non-payment, affix or agree upon the penalty of payment of interest at any rate or at any times, nor could it enter into any contract whatever for the payment of interest upon sums subscribed for stock. It could not dispense with the payment of the five dollars on each share, nor without such payments could or would any person become a legal or valid stockholder in the company. The amount of such payment would render the subscription null and void.

Again, by the spirit, and I think by the letter of the charter of this R. R. Co., all contracts for subscriptions to its capital stock are required to be uniform; stockholders are to stand upon an equal footing with each other; each must be liable to pay for his stock subscribed as often and in the same amounts as every other; and wheresoever that company, in any contracts of subscriptions, has given one stockholder or set of stockholders any advantage over others, either in time of payment for stock subscribed, or in the amount from time to time to be paid, or where it has required payment in any other way or manner, or in any greater amount, from time to time, than prescribed by its charter, it has acted without authority of law, it has violated its charter, and the contracts, not only as to itself, but as to the subscribers to its stock, are absolutely null and void. The bonds of the city are not payment for stock subscribed; they are merely promises to pay; and it is evident that the subscription was made upon the agreement that the sum subscribed should not be paid, in pursuance with the provisions of the third and sixth sections of the charter of the railroad company, as other subscribers were to pay, or might be required to pay; but that it should be paid at the expiration of twenty years, and that as a consideration for the time of payment, the city should pay semi-annual interest, at eight per cent. per annum.

It may be that the city charter had given the power to the city to subscribe for stock in any railroad running to or pass-

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ing through it, and to issue bonds to pay the stock thus described. And that inasmuch as the city was authorized to become a stockholder in the company, in that way, the railroad company might legally receive the subscription and issue the stock and receive the bonds in payment therefor. If the company had no power to enter into such a contract for subscription to its stock before the passage of the city charter, I do not see how it can be claimed that any such power has been conferred upon the rail road company by any of its provisions. The city charter does not, by any of its terms, refer in any way to this rail road company, nor to it charter; it does not in any way alter or amend it, and I do not think that the power to subscribe and pay for stock by one, is or can be convertable into a power by the other to receive the subscription and agree to receive in payment that which the other is authorized to give. The power to give bonds for stock, by the city, confers no power on the company to exchange or give stock for bonds.

The 9th section of chapter 4 of the city charter, confers the authority on the common council to issue the bonds of the city, with interest warrants or coupons attached, drawing not more than ten per cent, interest, &c. The bonds set out in the complaint draw eight per cent. interest, payable in the city of New York, semi-annually. Is not the proper and only construction to be given to the language employed, that the bonds are to draw interest at a given rate, payable when the principal becomes due, and not annually or semi-annually? It is certain if the bonds in question were in the exact language of the statute, the interest would be payable when the principal becomes due, and not before. The common council had no power to issue these bonds, and they, as well as the coupons, are void; or, if not wholly void, the promise to pay the interest sooner than the principal is void, and this action cannot be maintained.

The city of Janesville was, at the time when these bonds were issued, a part of the state of Wisconsin, and by the act of incorporation constituted one of its civil division. It could not engage in the business of building railroads, nor subscribe for stock in any railroad company, nor issue its bonds for the purpose of raising money to pay for such stock subscribed, nor deliver them to the railroad company in payment for stock subscribed, had not the Legislature, by express words, conferred upon it that power. It, therefore, becomes an im-

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portant question in this case, as well as in the state generally, whether, under the constitution of this state, the Legislature has power to confer on municipal corporations, the power either to subscribe for stock in, or loan their credit to these private corporations, for the purpose of aiding them in constructing their lines of roads.

By reference to the constitution, it will be seen that "the credit of the state shall never be given or loaned in aid of any individual, association, or corporation." Sec. 3, Art. 8. Section 10 of the same article, provides that "the state shall never contract any debt for works of internal improvements, or be a party in carrying on such works." These provisions, I think, cover the whole ground, so far as the state itself is concerned; and it becomes material to inquire whether the state may authorize the towns, cities and counties throughout its territorial limits to give or loan their credit to any "individual, association or corporation," or "to contract any debt for works of internal improvement, or be a party in carrying on such works." The words "works of internal improvement," as used in the constitution, have a well known and well understood signification. At the time of the formation of our state government, and the formation of our constitution, the whole country was just recovering from the effect of the universal rage for speculation which had preceded the crash of 1836. We had all around us, in our sister states, examples of bankruptcy and repudiation by states, consequent upon the commencement of canals and railroads, and the contracting of state debts to carry on those works by the state. The states which had attempted to carry on works of internal improvements in their own names as state works, were compelled to suspend; and the consequences which followed were, as ought to have been expected, a depreciation in all kinds of property in the state, and an entire stagnation in all departments of business. Emigration then pouring westward and seeking locations, turned away from them, on account of the burden of taxation which must necessarily be borne, in order to relieve the states from the stigma fixed upon them on account of the spirit of repudiation which ruled their councils. Our people saw all this, and the hardy pioneer who had settled here, that he might not be compelled to pay, or assist in paying state debts, very naturally sought, in forming a constitution for his own state, to put it out of the power of the legislature to burden the people with debt and taxation; and

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to that end, following the examples of the states where the constitutions were then being amended, the framers of the constitution set it down therein, that economy was to be a ruling principle in the government. To that end they limit the power of the government to create debts, they prohibit the loaning of the credit of the state to individuals, associations, or corporations; they prohibit the state from creating debts for works of internal improvements, and from being a party in carrying on such works. It is from the history of the times, from the occasion which brought about these limitations of power, from the general understanding of what was then meant by the words internal improvements, schemes of internal improvement, and the like, that we are to arrive at a correct definition or meaning of the words, "works of internal improvements," as used in the constitution; and it is from all these things that we conclude and know that these words signify not the making and repairing of highways by our town authorities; not the improvement of streets in cities and villages, but the building and carrying on of railroads, canals, and the like, forming great continuous highways throughout the length and breadth of the state; and which, uniting with similar works in sister or adjoining states, make up the grand channels of commerce, travel and intercourse. It is admitted that the cases found in the books are to the point, and decide that in the absence of any prohibition in the constitution, the state itself might build railroads and canals, and do any other possible thing; and that being vested with the whole legislative power of the state, might authorise towns, cities and counties in the state to do the same thing; and that the exercise of this power, and action of towns, cities and counties, in pursuance thereof, would not be a violation of the constitutional provision that no person shall be deprived of his property without due process of law, and that private property should not be taken for public use, without just compensation therefor. I shall not in this argument attempt to show that the cases upon this point are or are not erroneously settled; for I think, the question in this case, arising as it does under a constitutional provision, differing from those of the states where the decided cases arose, I may concede the correctness of the *judgment* in these cases, without in the least weakening the position assumed here, that the act of the legislature incorporating the city of Janesville, in so far as it attempts to confer power upon the city to sub-

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scribe for stock and issue its bonds in payment therefor, is unconstitutional and void. I put this proposition upon the ground that the purposes for which towns, villages, cities and counties are incorporated or organized in this State, are not to build railroads, canals, plank roads, mills, or the like, but are simply those of government; and that inasmuch as the state itself is prohibited by the constitution from taking stock in these railroad companies, from building them itself, and from being a party in carrying on such works, it has no power to authorize towns, villages, cities or counties to do what it is itself prohibited from doing; that that cannot be done indirectly which cannot be done directly. If the state itself were the stockholder, if the bonds were bonds of the state, and if this subscription had been made and these bonds issued, in virtue of a law of the Legislature of the state, the effect would have been to impose upon the people and property of the state the liability to pay for the stock subscribed. And, if after having made this subscription and issued these bonds, the Legislature, under the pretence that the construction of this railroad would be a local benefit to the city of Janesville, had provided by law that the interest and principal on these state bonds should be paid by the city of Janesville, by tax raised in the city, and levied upon and collected from the property in the city, can there be any doubt, that the city could successfully defend against and resist the collection of such a tax? Or suppose the act under which the subscription was made, and the bonds issued, had provided that the stock subscribed should be held by the state for the city of Janesville, and that the bonds issued by the state should be paid by the city of Janesville, and that a tax should be levied to pay both principal and interest; can there be any, the least doubt, that the act itself would have been void, as in conflict with the constitution? Now I think I have shown, or if not, I think it is beyond dispute, that the object, intent, and purpose of the constitutional prohibition, was effectually and forever to prevent the legislature from imposing upon the people and property of the state or of any part of it, a liability to pay debts contracted for any such purpose; to prevent any action being had or taken on the part of the state, and to confine the exercise of all the powers of government; so that in no event, and under no circumstance could or should the people or the property of the state, or any of the people or property of the state be

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burdened with such debt, or subject to liability therefor, against or without their consent. The act in question is the act of the state, it is under the power of the state, exercised by the legislative department, that the people of the state in one of the civil divisions thereof, against their will and without their consent are burdened with a debt contracted for works of internal improvement, that they are a party in carrying on such works. The state itself could not by its own direct act burden them with such a debt; it could not in its name, have made them a party in carrying on this work of internal improvement. How can it then delegate a power to a part of the state, to one of its civil divisions, or the people in one of its civil divisions, which it does not itself possess? If it may, then the fundamental law has failed entirely in its object, and the people will have found, too late, that the beast has been wounded in only one of his horns, that only one of his legion of heads has been cut off, and that even the loss of that has not in the least diminished his power. If we are to be confined to the letter of the constitution; if it is not to be construed by its spirit; if it is to be held that these prohibitions are only to the acts of the state in its own name; and that, notwithstanding, the state may not directly by its own act burden the people with debts, contracted for works of internal improvement, nor by and in the name of the state make the people a party in carrying on works of internal improvement, still it may, in the exercise of legislative power, authorize the people of towns, villages, cities, or counties, by the act of majorities, to contract these debts and bind the whole to their payment, and to make the whole a party in carrying on works of internal improvements; then, the constitution, instead of being a shield, is a snare. If the legislative power may be exercised in a case like this, the power may be conferred upon boards of supervisors of towns and counties, trustees of villages and the municipal authorities to contract debts in the name of their respective towns, counties, villages and cities, for works of internal improvement, and make the people of the state within their respective towns, counties, cities and villages a party in carrying on such works, without ever submitting to them the question whether they will or no. This power may be conferred by a general law of the state, and in this indirect way the people of the state, by acts done under the power of the state, may be burdened with debt and taxation, may be a party in carrying on works

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of internal improvement as effectually as if there had been no constitutional prohibition. And, further still, if this may be done, why need these civil divisions be restricted in their operations, to railroads running to or passing through the particular locality? Is there any principle or reason which will preclude the legislature from authorizing them to subscribe for stock in any railroad in the state, or in any other corporation, organized for any purpose, which does not apply with equal force to the act under consideration? Indeed I do not see why the legislature might not go further and make it *obligatory* upon towns, villages, cities, and counties, to become stockholders in railroads and canals, under the pretence of the exercise of the legislative power of the people. In this way, the people who are the state; the state which is the people, would be as effectually overwhelmed with debts contracted for works of internal improvement, would be as deeply involved, as a party in carrying on works of internal improvement, as it could be by the direct action of the government in the name of the state. I maintain that the spirit and intent of those constitutional prohibitions is to limit the exercise of legislative power, so that neither the whole state, nor any one of its civil divisions, any of its constituent parts, shall by any manner of means be able to contract such debts, or be a party in carrying on such works. Give this construction to these prohibitions, carry out the spirit of these limitations, confine the business of making railroads, canals, and the like, to private persons or private corporations, as the framers of the constitution intended should be done, and then, on account of any future transaction, we shall never hear the lament that now on every hand assails our ears from a tax ridden and debt burdened people. We shall hear no more of repudiation by towns, villages and municipalities; there will be no more clamor for the assumption by the state of debts contracted against the will and without the consent of the whole people, and our town, village, city and county governments will confine themselves to the exercise of their legitimate and proper powers, that of carrying on and administering the government within the sphere assigned to each.

George B. Ely, for the respondents, argued as to the constitutionality of the act incorporating the city of Janesville, which authorized the city to become a stockholder in railroads running to it. In support of the position that it was

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constitutional, he cited Calhoun's works, vol. 1, p. 2-8, Disquisition on Government; id., Discourse on the Constitution and Government of the United States, 161; Constitution of Wisconsin, Art. VIII., §§ 3, 4, and 10; *Slack vs. Maysville and Lexington R. R. Co.*, 13 B., Mon.1; Constitution of Wisconsin, Art. IV., § 22; id. Art. X, § 3; id. Art. XI, § 11; Journal and Debates of Constitutional Convention, 478; 9 Humph., 252; *Scudder vs. The Trenton and Delaware Falls Co.*, Saxton ch. (N. J.), 696; Constitution Wis., Art. XI., § 3; *McCulloch vs. Maryland*, 4 Wheat., 298; *United States vs. Fisher*, 2 Cranch, 328; *Sharpless vs. The Mayor of Philadelphia*, 21 Pa. St., 148; *The Cincinnati R. R. Co. vs. Clinton County*, 1 Ohio State, 77; *Goodwin vs. Crump.*, 8 Leigh, 120; *Bridge vs. Housatonic R. R.*, 15 Conn., 475; *Graham et al. vs. Maddox et al.*, Am. Law Reg., Aug., 1858; *Clark vs. City of Rochester*, 5 Abbott, 107, S.C. 24 Barb.; *Thomas vs. Leland*, 24 Wend., 65; *Mayor of New York vs. Livingston*, 8 id., 110; *People vs. Mayor of Brooklyn*, 4 Coms, 436; *Talbot vs. Dent.*, 9 B. Mon., 526; *Cheeney vs. Hoover*, id., 330; *Clark County vs. The Paris and Winchester Turnpike Co.*, 11 id., 143; Opinion of Hitchcock, C. J., 20 Ohio; *Barto vs. Himrod*, 4 Seldon 483; *Rice vs. Foster*, 4 Harrington, 479; *Moors vs The City of Reading*, 21 Pa. St., 202; *Vermont Central R. R. Co. vs. Clages*, 21 Verm., 30; *Inhabitants of Upper Alloways Creek vs. Sting et al.*, 5 Halsted, 323; *Milledge vs. Boston Iron Co.*, 5 Cush., 176; *Boisgerard vs. New York Banking Co.*, 2 Sand. Ch., 23; Angell & Ames on Corp., § 206; 3 Bl. Com. 110; *Judges of Oneida Com. Pleas vs. People*, 18 Wend., 79; 2 Bur. Pr., 172.

At this point in the discussion we are met by the decision of this court at the present term, in the case of the *State ex rel. Cothren vs. Laen*, which is claimed to be decisive of this case on a question not raised on the former argument of this cause at the last term of this court.

The legislature, at its session in 1858, passed an act to provide "for the removal of the county seat of Iowa county." This act was not published in the volume of acts for 1858. But after the publication of the volumes of acts for that year it was published about 40 days before the election, in the state paper, and in a newspaper printed in Iowa county. This court decided, 1, that this was a general law within the provisions of § 21 of Art. VII of the Constitution, and could not go into force "until published." 2, that the publication of the

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act in a newspaper printed in Iowa county, and in the state paper *after* the publication of the bound volumes of the laws for 1858, was not such a publication as rendered the law operative. The decision covers these points, neither more nor less.

The act incorporating the city of Janesville, under the provisions of which these bonds were issued, was approved March 19th, 1853. It was not published in a newspaper printed at the capitol, but was published in the Janesville Gazette, a newspaper printed at Janesville, April 2d, 1853, and in the Democratic Standard, also printed at Janesville, March 30th, 1853, and was also published in the volume of Private and Local Acts, in October, 1853. This act created the people then inhabiting and those who should thereafter inhabit the district of country described in the act, a municipal corporation by the name of the city of Janesville.

Under the provisions of this act the people residing in Janesville on the 1st day of April, 1853, held an election for city officers, and organized the city government. The mayor and common council at once enacted the great body of ordinances which now obtain in that city; and finally, in July, 1853, three months before the volume of Private and Local Acts for that year were published, and after the body of the ordinances were passed, held an election pursuant to the charter, on the question of issuing these bonds.

This brief statement of facts, it seems to me, shows that there is but little analogy between the two cases, and that the decision of this court on the Iowa county seat question, cannot, by any fair process of deduction, be held applicable to this case. We say the charter of the city of Janesville was a local and not a general act, and if a general act, that it was well published.

Courts usually do and always should stop short at the argument "*ad inconvenienti*," &c., when they see clearly that a certain line of construction will produce great and irreparable injury to large masses of the people.

The act incorporating the city of Janesville was passed in 1853, and published as above stated. In 1854 two acts were passed amending the charter. In 1855 the charter was further amended by two acts, and again in 1856 by three acts, and again in 1857 by five acts, and again in 1858 by four acts. Three of these were general revisions. It is believed none of these laws were ever published in any manner, ex-

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cept in the volumes of Private and Local Laws and in pamphlet form, at Janesville. None of the volumes of Private and Local Laws for these years were published before the month of July, and the volume for 1856 was not published till December of that year. If these are all general laws that could not go into force till published in the state paper or the printed volumes, and if no other publication was sufficient, where does the city of Janesville, and every other city in this state, stand to-day? Three-fourths of the ordinances of all the cities of the state have been passed without authority of law. They have erected bridges and school houses, opened and graded streets, levied and collected taxes, imposed fines and penalties, and administered justice in their municipal courts without legislative sanction, and their officers are liable to actions without number for false imprisonment, for trespass, and for money had and received. And their public services, in behalf of these cities, rendered in good faith, under the sanctions of their oaths of office, will have overwhelmed them with a torrent of misfortunes. And why? Simply because two gentlemen who set in this court have recently discovered that the practice which has obtained in this state ever since the adoption of the constitution in relation to the publication of laws, has been radically defective and wrong, so much so as to render many if not most of the acts of the legislature inoperative for months after they were everywhere, by courts and people, esteemed valid and obligatory.

But let us examine the question further. The constitution provides, sec. 21, Art. VII, that "the legislature shall provide by law for the speedy publication of all statute laws. * * And no general law shall be in force until published."

How are the words "general law" to be construed? Are they the equivalent of "public law?" or rather, are not the words "general law" in the selection above quoted, used in contradistinction from local, and not as the equivalent of public laws. The distinction between public and private acts is well know to the profession. It consists entirely in the rule that courts will take notice of public acts without their being pleaded, while private acts must always be pleaded. Can it be that the able lawyers who were in the convention confounded the word public with the word general, and used the latter word as synonymous with the former? Every general act is necessarily a *public* one. But is every public law a

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general one? The rule is, when a private act is referred to in a public law, the private law thereby becomes a public law, and courts will take judicial notice of it. This rule was recognized in the case of Charles Roger, 2 Greenleaf, 303, cited by this court in the Iowa County Seat case, and also in *Samuel vs. Evans*, 2 T. R., 569. If the legislature were to grant to A. the right to erect a dam across Rock river, no one would doubt its being a private law. If the act, however, contained a provision that it should be a public law, or if a subsequent public law should recognize the franchise, every one would concede this private grant would by either of these things become a public law, of which the courts would take judicial notice. But what a perversion of terms it would be to say that by either of these things this grant of a franchise would become a *general* law. If public laws and general laws are to be held *ex vi termini* to be the same things, what becomes of the distinction between local and private acts on the one hand, and general acts on the other?

The constitution provides § 18, Art. IV., that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in the title." It has never been questioned but general laws may, nay, general laws very often do, embrace more than one subject. If a law is *general* it cannot be *private or local*. And, if all public laws are "general," what becomes of this wise constitutional restriction on legislative log rolling. The legislature creates a corporation sole or aggregate, or grants a franchise, and, either by a provision incorporated in the act, or by a public act passed the same day, recognizes this private act, which thus becomes a public law by force of a current of uniform legislative and judicial sanction commencing back to a period long before the revolution, and so firmly established that no court could shake it. And if being a public act it was *necessarily* a general law, how could this court pronounce it invalid under § 18 of Art. IV., though it should embrace never so many subjects, should be ever so clearly a log rolling act.

I do not propose to question the decision of this court, that the act providing for removing the county seat of Iowa county is a "general law" within the constitutional provision. I am inclined to think, for the reason assigned in the latter part of the opinion of the court on the question, that the decision is correct. For, as is justly observed, the act did affect

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the general administration of the laws of the state in that county, by providing for a change of the place to which all writs and process issued from the courts of Iowa county should be returnable. Nor shall I attempt to lay down any general rule to divide that *terra incognita* which lies between laws which are clearly general and those which are clearly local. To do so would be very difficult, perhaps impossible. Certainly the only safe rule is to say as to such laws, that each case must be decided on its own merits, and the decision should not be a precedent for the determination of any different case.

But, as I understand the reasoning of the first part of the opinion, it does attempt to establish as a general rule, that public are necessarily general laws. I have attempted to show that this rule is incorrect. The court cite as sustaining the rule, which I understand it to have laid down, 9 Greenleaf, 54; 4 Shep., 69; 8 id., 58; 4 Blackf., 236; and 12 Pick., 334. Permit me to say, not one of these decisions support any such rule. They all relate to the question of what is a public law, of which the courts will take judicial notice without their being specially pleaded. We have seen this is a totally different question. The cases in 4 Shep., 69, and 8 Shep., 58, would at first appear not to turn on the question of what is a public statute of which the courts will take judicial notice, but upon examination I think it will be found that was the real question involved.

Most of the acts incorporating railroad and plankroad companies in this state were by the provisions of the charters public laws, and all these charters, by operation of chap. 79 of Rev. Stat., have become such. Yet none of these acts have ever been considered general laws and have not been published as such.

All will concede that those are general laws which affect the people at large or perhaps large districts of the state, and those are local laws which affect only particular localities or communities. Is then the act incorporating the city of Janesville a general law? It clearly is a public one. It affects but one community. It embraces but seven sections of land. It contains only seven square miles of territory and less than ten thousand people. If this is a general law, I should like to learn what is a local law, and the rule by which the one is distinguished from the other. Construe general laws to be only those which operate all over the state, or over a large

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portion of the state, and which affect the whole body of the people of the state, or large classes of the people throughout the state, and the constitutional provisions requiring them to be published before they become operative, will be wise and benificent. For it could not be supposed that the mass of the people to be affected by such laws inhabiting different communities and separated by considerable distances, could know their provisions, until efficient means had been provided by the state for general dissemination.

That the legislature regarded the charter of Janesville as a local not a general law, conclusively appears from sec. 14, chapter 10, of the charter, which provides that "no general law of this state contravening the provisions of this act shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law." The act also provides that it "shall take effect and be in force from and after its passage."

The next question is, conceding for the argument that the city charter is a general law, was it well published as such? The decision of this court in the Iowa county seat case does not reach this question. It will readily appear that the cases are very different. The city charter was published in two newspapers printed at Janesville, immediately after its passage, and was some months later published in the bound volumes. Neither does the reasoning of the opinion contain one word indicating that the publication of a law in the state paper is a *sine qua non* to its being operative before the publication of the bound volumes. Quite the contrary. It says publication in the state paper, or in a local paper, *after* the publication of the bound volumes would not be good, but that publication in the state paper "immediately" after the passage of a law, would be good. But no where, either inferentially or otherwise, does the opinion discuss or consider whether any publication other than in the state paper, and, if any, what publication "immediately" after the passage of an act would be sufficient to render the law operative. For aught that appears in the opinion, the general circulation of a law in a pamphlet form, or its publication in a considerable number of the papers of the state, and not in the state paper, would make the law operative. In this I desire to be understood as referring to the second opinion of the court in the Iowa county seat case, where the question of publication was the only one under consideration. I am

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aware the majority of this court hold different language in the first opinion in that case, when considering the question whether the non-publication of the law was well pleaded. The court says "it, the petition for mandamus, avers that the act was never published in accordance with the provisions of chap. 6 of General Laws of 1858, or in any other manner known to the law. And we think, in order to give it effect, the publication must be in some manner known to the law. The constitution says that the legislature shall provide for the pulication of laws, and that no general law shall be in force until published. We think the publication mentioned in the last clause is the one required to be provided for in the first, that is, that it must be in pursuance of some law." That so much of the passage above quoted as relates to the manner of publication is mere *dicta*, appears from a consideration of the subject then under discussion. That this court regards it as *obiter dictum*, appears from the second opinion, in which with studious care the court avoid any consideration of what is a sufficient publication. Nevertheless, this *dictum* in a case so recently decided in this court, *obiter* though it be, deserves a careful examination. As I understand it, it is that no publication is good unless made by direction of the state printer, in a paper printed at Madison, or in the bound volumes. The constitution says "the legislature shall provide by law for the speedy publication of all statute laws. * * * And no general law shall be in force until published." Of course the word legislature here used refers to that of the state. And if no general law can go into force except by publication pursuant to a provison made by the legislature, it must follow if the legislature had omitted to prescribe a mode of publication, that no general law could ever become operative, though it should be published in every newspaper in the state, and be brought home to every inhabitant. Nay, if such is the rule, how has any act heretofore passed become operative since the first law providing for the publication of statutes was a general law which could not go in force until published pursuant to a law in force, which the legislature could not by any possibility have provided? The language of the constitution "that the legislature shall provide for the speedy publication of all statute laws" is only directory to the legislature. There is no means of compelling legislative obedience to it. And can it be possible that the failure of the legislature to comply with

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such a provision would defeat the wholesome operation of the constitution by rendering all laws, no matter how generally published, in point of fact, inoperative. What would be the effect of adopting such a rule? The statutes, laws of 1852, chap. 504, laws 1857, chap. 99, laws 1858, chap. 114, provide that "the laws passed at each session of the legislature shall be divided by the Secretary of State and Attorney General into two classes, which shall be published and bound in separate volumes. The first class shall include the laws of a general nature, joint resolutions and memorials. * * The second class shall include all laws required to be published which are not embraced in, and published with the laws composing the first class. The title pages of the respective volumes shall express whether they contain the acts of a general nature, or the private and local acts and charters of incorporated companies."

From this it is self-evident that no general law would, by being published in the volume of Private and Local acts, be published *in the manner* prescribed by law, or in pursuance of any law, for there is no law authorizing general laws to be published with the private and local acts. Yet this court will hardly say that such a publication would be insufficient, since to do so would be to blot out almost every city, village, or or railroad charter in the state, if this court hold such to be general laws. Again, this court has held these acts relative to publishing the laws to be directory. How can this be, if general laws must be "published in pursuance of some law." If these laws are directory, how can they be mandatory, so as to make compliance with their provisions the *sine qua non* of a general law becoming operative?

But these acts were not so much intended to prescribe the mode of publishing the laws as to prescribe the mode of letting the contract for doing the state printing, and the duties of the state printer under his contract. Surely if we are to look for the laws only in the channels which the legislature has provided for their publication, it would be, to use the language of this court, to make the volume of private and local acts to "serve as a snare, and delude men into a false idea of safety." For, if the proposition is correct that the laws must, to be operative, be published "*in pursuance* of some law," then by the volume of general laws, the people are "legally informed that those are the laws, and that there are no other laws by which their rights

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may be affected." The statutory provisions are positive and definite that all general laws *shall be* published in the volume of "acts of a general nature," and they are silent as to what shall be the depository to which the people shall look. The provisions made by the legislature for the publication of the general laws, are that they shall be published in a newspaper printed in Madison, and in the bound volumes. As a matter of fact that very large classes of laws of which we are speaking, city charters and the like, never have been printed in the state paper—have only been printed in the volume of Private and Local Laws. But it is manifest, from the Rev. Stat., 1849, chap. 5, and the other provisions on the subject, that the legislature did not intend the people should look *chiefly* to these bound volumes to ascertain what the laws were. Quite the contrary. All these provisions show that the bound volumes were designed to aid the officers of the state in the administration of the law, by providing them with the whole body of legislative enactments in a compact and convenient form. By the Revised Statutes, 1859, the laws were to be distributed only to certain public officers. No provision was made for distribution among the people, except that the State Librarian was authorized to sell to any person one copy of any laws remaining on hand after the distribution among the public officers.

The legislature, in 1852, provided, for the first time, that the general and local laws should be published in separate volumes. In this act it is provided that 8,000 copies of the general, and only 3,000 copies of the local laws should be published, and that these should be distributed among the public officers in the state, but only a part of the officers who were entitled to receive the public acts should be entitled to receive the private and local acts. When we consider these provisions of law, and further, that these bound volumes are never distributed, and are not required by law to be distributed within less than sixty days after the adjournment of the legislature, and that, in fact, they are often not distributed for five or six months after the close of the session, it cannot be presumed that the law-makers ever intended the people should look to these volumes for information as to what the law was. These laws were to be in force always sixty days, often six or seven months before these means for their public dissemination could attain this end.

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As a matter of fact, the bound volumes of laws are never brought home to the body of the people, and were not intended to be brought home to them. It would be idle to suppose that 8,000, much less that 3,000 copies would or could serve to inform the whole body of the people what the laws are.

This referring to the printed volume as the means provided by the legislature for the dissemination of the laws among the people, is to forget the age in which we live, and to assume that we live in the days of the manuscript "News Letter," which obtained in England in the times of the Tudors and Stuarts; not in the sixth decade of the nineteenth century. Who is there at this day that looks to bound volumes to ascertain the events which are transpiring? The newspaper has become almost the institution of the age; it circulates among all classes of the people, it invades every fireside in the state, disseminating knowledge among the great body of the people of whatever concerns them. It is to this source above all others, to which they look for information; it is the great educator of the people. And to say that the framers of the constitution and our legislators have not intended that the press should be above all others, the medium of instructing the people as to their rights and duties, is to say that they wilfully shut their eyes to the actual condition of things, and refuse to look at the best, nay, the only adequate means for the general dissemination of the laws.

Permit me to say what I think is the true rule of construction as to the publication of the laws. It is asked by the court, *arguendo*, if the publication of a law in a newspaper printed at the capitol the day before it directs an act to be done in a distant part of a state, would be a good publication? Most assuredly not. Neither would the publication of the bound volumes to-day containing a law directing an act to be done on lake Superior to-morrow, and imposing penalties for not doing it, be a good publication. Publication must be adequate to the end in view—must be such as will enable the citizens to be affected by the law, to ascertain by reasonable diligence what the law is. Yet the *dictum* of the court necessarily leads us to the conclusion that a law becomes operative the instant it is published in a paper printed at the capitol, or in the bound volumes. This one view must establish that the court has mistaken the true rule. It is easy to say in most cases what is and what is not a good publication; yet extremely

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difficult to indicate the line which shall always correctly distinguish the good from the insufficient publication. The line in each case must depend upon the scope of the particular law, and the location of those to be affected by it. The true rule will be found to be, that where the people interested in the law, were actually apprised of its contents, or could by the exercise of ordinary diligence, learn its provisions in time to render it possible for them to obey it, then the law is operative, otherwise not. A literal compliance with the statutory provisions requiring publication in a paper printed at the capitol, would not *necessarily* be such a publication. But ordinarily, publication in a paper printed at Madison, would be good, because such publication would render it probable that the people interested in the law would be apprised of that publication, either by seeing the paper itself, or by seeing the law republished in the local papers circulating among the class or people interested in its provisions.

It is clear, I think, from the statutory provisions already cited, that the publication of the laws in a newspaper printed at the capitol, and their publication in the bound volumes, were not intended to be the *only* means of publication, nor to exclude any other proper mode of publication. These provisions of law were only *directory* to certain officers of the state, prescribing what they should do as state officers towards the dissemination of the laws among the people—not *mandatory*, that the publication prescribed by those laws should be the only publication. Otherwise, if from accident or design these state officers should wholly fail to perform this duty, the will of the people expressed in the constitutional form through the legislature, would necessarily be defeated, and wholesome laws, necessary to the well-being of the people, be inoperative, even though these laws had been published in every paper in the state, except only the one printed at Madison, in which the state printer had directed laws to be published, and by such publication had actually been brought home to every fireside in the state. The assumption that the laws *must* be published in the manner prescribed in the statutes cited, is to leave it exclusively with the state printer to determine what acts of the legislature shall become law. His bankruptcy, his violation of his contract, or his sickness or death, might, either of them, if this rule is to be adopted, defeat the operation of laws of which perhaps every citizen of the state might, by some other publication, have become ap-

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prised, when generally the publication directed by these acts, would have utterly failed to attain this end.

An examination of sec. 21, of Art. VII, of the constitution, will confirm the correctness of these views: "The legislature shall provide by law for the speedy publication of *all* statute laws, and of such judicial decisions made within the state as may be deemed expedient. And no general law shall be in force until published." The language is not that no general law shall be in force until published *in the manner prescribed by law.* Saying that general laws shall not be in force until published, is equivalent to saying that such laws *shall* be in force when published, whether the publication is made in the *precise manner* prescribed by the legislature or not. The section contains two entirely distinct provisions, the one mandatery only to the legislature, the other limiting its powers. Manifestly, if the framers of the constitution had intended that laws should not be operative until published in the manner the legislature should provide, they would have so said, and would not have left this provision, when interpreted by any proper rule of grammatical construction, to declare that all general laws should be in force when published, without any reference to the mode of publication.

I am utterly unable to see the force of the expression of the court, "We think the publication mentioned in the last clause of sec. 21, Art. VII, of the constitution, is the one required to be provided for in the first, that is to say, that it must be in pursuance of some law." The legislature shall provide for the publication of "*all* statute laws," whether local or general, private or public. "And no general law shall be in force until published." According to the logic of the expression, general laws may go in force by such publication as the legislature may provide for private and local laws which require no publication in order to their validity.

Can it be that the framers of the constitution were guilty of such folly? And by what process of logical deduction do we arrive at such a conclusion? The words, "in the manner prescribed by law," do not follow the provision concerning the publication of general laws. Why should this court interpolate them upon this constitution provision.

A. D. Smith, on the same side, examined the constitutional power to authorize the subscription for the railroad stock by the city of Janesville; also that the city was liable to pay these

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coupons to these plaintiffs. On that point he cited the following authorities in addition to those given in the brief of Mr. Ely: *Mechanics' Bank vs. N. Y. & N. H. R. R. Co.*, 11 Paige, 634; S. C., 3 Kern., 599; *Delafield vs. State of Illinois*, 3 Hill, 159; *Gorgier vs. Mieville*, 3 B. & Cress., 45; *Lane vs. Smyth*, 7 Bing., 284; *Craig vs. City of Vicksburg*, 9 Am. R. R. Times, No. 11, March 12, 1857; *Chapin vs. Vermt. & Mass. R. R. Co.*, 20 Law Reporter, 650; 20 How., 371; 18 N. Y. Rep., 39.

By the Court, PAINE, J. This case involves the validity of bonds issued by the city of Janesville in aid of a railroad. The question is justly deemed an important one, and has given rise to much discussion, both in court and out. It is supposed to involve not only private safety, but the public honor; and appeals have been made on the one hand to protect tax payers from impending ruin, and on the other to preserve the honor and good name of the state from the blight of repudiation. Appeals of this character can have no weight with a judicial tribunal. Not that courts cannot look beyond the letter of a law in interpreting it. Undoubtedly they must construe it, as all written instruments are construed, by the light of surrounding circumstances. The existing condition of things, the evils to be remedied, the objects to be attained, may all be looked at, and frequently require to be looked at, with the closest scrutiny, and the clearest judgment, in order to determine what the law is. But beyond that, courts cannot go. They cannot turn aside from the conclusion to which such an examination leads them, either to avoid one evil consequence or another. It is the province of the judicial mind, like the compass, to declare the true direction of the law, without regard to whatever obstacles may lie in the way. It is for the legislative power, like the pilot, to make such changes as may be made to avoid these obstacles.

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This action is brought upon the coupons. The bonds to which they were attached, as appears from the complaint, were issued in pursuance of an authority contained in the charter of the city of Janesville, by which the common council were empowered to submit the question to the voters; and if the vote was in favor of it, to issue the bonds in payment of its stock subscription to the railroad company.

The first objection taken relates to the regularity of the election. It is claimed that the complaint must show that every step was taken as required by law, preliminary to the issuing of the bonds. And it is then said that the notice of the election was not properly published, because it appears from the complaint that the ordinance which alone authorized the clerk to publish it, was first published in the same paper with the notice, and not being in force till it was published, could not have conferred any authority on the clerk to publish the notice. Conceding that it appears from the complaint, that both were published together, which I think does not necessarily appear, the objection is of too metaphysical a character to be established as a rule to govern the ordinary transactions of business. The ordinance authorized the clerk to publish the notice, and though it was not in force itself, until published, and though it was published at the same time with the notice, I have no doubt that its publication then rendered that of the notice legal and authorized. The authority to publish the notice existed simultaneously with its publication, and authorized it. And it would be proceeding upon too refined and technical principles, to hold such a publication unauthorized, because the ordinance was not yet operative when the clerk carried the papers to the printer.

But the true answer to this objection, and to all the others involving the regularity of the proceedings on the election, is that the city, after having issued the bonds, and after they have passed into the hands of *bona fide* purchasers for value,

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cannot defeat an action upon them by showing such irregularities. This was expressly decided in the recent case of *The Commissioners of Knox County, Indiana, vs. Aspinwall et al*, 21 How., U. S., 539. It was there held that statutes authorizing the issuing of such bonds are public statutes, and that purchasers are bound to know them, so far as to see that the authority existed; but that when they had found the authority, its exercise made dependent on an election held in pursuance of notice, they were not bound to inquire into the regularity of all the proceedings in the election. But the bonds being issued and purporting to be issued in pursuance of the law, they were entitled to presume that the preliminary steps had been taken. It was also held that the law itself made the board, who were to issue the bonds, judges of the fact whether the election had been properly held, and what was its result; and that their judgment upon these facts, though it might be reviewed in a direct proceeding before the execution of the power, yet it could not be reviewed after its execution, and the bonds had passed into the hands of *bona fide* holders, and certainly not in a collateral proceeding.

The case of the *Royal British Bank vs. Turquand*, 88 E. C. L., 325, referred to in this opinion, also fully establishes that the purchaser in such case, finding lawful authority to issue the bonds after certain preliminary steps, and finding the bonds issued, ought not to be held bound to inquire into the existence and regularity of those steps. I think this doctrine just and reasonable; and that this rule constitutes a proper limitation to the general rule that parties dealing with the officers of such corporations are bound to know that they have authority to act. This latter rule is undoubtedly necessary, for the proper. protection of those whom such officers represent; but it should not be carried so far as to destroy the safety and rights of those who, with good faith and due diligence, deal with such corporations, and I think

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this would be the result, if these bonds are invalidated for such reason. How could a purchaser inform himself with any certainty, whether every step in an election of this kind had been regular? It extends through the several wards of a city. The records of what is done are frequently imperfectly made, and those that are made, are imperfectly preserved; and sometimes no record at all is required. And where is he to stop? The records, even though entirely regular, and showing everything done as required, are not conclusive. It is the majority of the legal votes that determines the question; and this court has held, that in order to arrive at this, the parties may go behind the certificates, even when the right to the executive chair is in issue. Should the city then be allowed to defeat this action by showing that enough illegal votes were cast at the election to overbalance the majority? I think the same principle that would sustain these objections, of irregularity in the notices, &c., would go to that extent. And such a rule would destroy all safety in dealing with corporations. It seems to be contrary both to law and justice, that they should be allowed to hunt up hidden irregularities in their own preliminary proceedings, to defeat obligations which they were authorized to issue, and for which others have parted with their property. The particular character of this transaction, and the question whether the stock subscribed for is now valuable or worthless, or whether the policy of subscribing was wise or foolish, can have no legitimate influence in determining the rule of law that should be established upon this point. The same rule that should be applied if the bonds had been issued to build its public buildings, and had been sold at a premium, and the money used for the purpose, I would apply here. And I think in either case the city cannot defeat its obligation by showing irregularities in the election.

The effect of showing such irregularities in a direct pro-

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ceeding by any person interested, to prevent the issuing of the bonds, is another question not presented here.

But it is objected that the R. R. company had no power or authority to receive this stock subscription by the city. The substance of this objection is, that this subscription by the city is not the kind authorized in the charter of the company, that the charter was still in force, unchanged, and that the charter of Janesville only authorized the city to subscribe, but contains no authority for the company to receive the subscription. This reasoning seems to me also of too refined and technical a character for practical purposes. I concede that the provisions of the company charter do not authorize it to receive subscriptions of this kind. But the power is clearly given by the charter of Janesville. It is a well settled principle, that a grant of power carries with it, as incidental, every thing necessary to its execution. Can it make any difference whether the thing necessary, implies an additional capacity in the one executing the grant, or in the one with whom, or the subject upon which it is to be executed? I think not. It is a question simply at to the intent of the legislature. They grant the city power to subscribe for the stock of the company, and give its bonds in payment. Did they intend that the company should have power to receive the subscription and issue the stock for the bonds? No one would seriously assert the contrary. Have they then employed the necessary language to show this intent? I think so, clearly, in granting the power to the city to give the bonds for the stock. This carries with it, by irresistible implication, the power to the company to give the stock for the bonds, and it would have been an idle repetition to have said it should have the power.

Suppose a law authorizing the issue of bonds by the state and providing that the Governor might negotiate them by indorsement; would it be necessary to say that they should be negotiable? Suppose a license required for marriage. If a

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license says A may intermarry with B, is it also necessary to say that B may intermarry with A? When these shall be held necessary, then I shall think that, under a law authorizing a city to subscribe for the stock of a railroad company and deliver its bonds in payment, the company has no authority to receive the subscription or the bonds, but not till then.

But the principle objection is, that the state itself cannot, under the constitution, authorize a city, town or county, to loan its credit in aid of a railroad. In support of this position, sections 3 and 10, Art. VIII, are relied on. The first is, "The credit of the state shall never be given or loaned in aid of any individual, association or corporation." And the last, "The state shall never contract any debt for works of internal improvement, nor be a party in carrying on such works," &c.

It is said that cities, counties and town, are parts of the state, constituting its political divisions, and that as such, they come within the spirit and intent of these prohibitions; that for the state to authorize them to loan their credit in carrying on internal improvements, is to do indirectly what it cannot do directly; and that to sustain such a law, is to say that the state may grant to a part of itself, the power to do what the whole cannot, and that power may be derived from a source where it does not exist.

It is manifest that the whole question is, whether for a city, town or county, to loan its credit, is a loan of the credit of the state? Whether, if either became a party in carrying on works of internal improvement, that makes the state a party to such work? Clearly, they are not within the letter of the constitution. A city is not the state, neither is a town or county. The question then is, whether they are within the spirit of the provision? And it seems to me, beyond doubt, that they are not. On the contrary, these two

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sections, like nearly all in Art. VIII, relate exclusively to the state, as a whole, and were not designed to regulate or limit the powers of counties, cities, or towns. This seems obvious on the slightest inspection of its provisions. Perhaps the first section, declaring that "the rule of taxation shall be uniform," might be held applicable to the taxing power delegated to these corporations. But I think there is no other section in the article that can have any application to them. Section 2 provides that "no money shall be paid out of the treasury, except in pursuance of an appropriation by law." But will it be said that this regulates the payment of money from the town, city or county treasury? No one would pretend it. Section 4 says, "the state shall never contract any public debt, except in the manner herein provided." The manner therein provided is, that every debt shall be authorized by law, for some purpose distinctly specified, and shall be passed by a vote of the majority of the members elected, by ayes and noes. But cannot a county or a town contract a debt without going through this formality? No one will pretend the contrary. Yet is there not just as much ground to say that "the state," as used in sec. 4, includes these lesser corporations, as to say it in regard to the other sections?

Sec. 9 provides that "no scrip, certificate or other evidence of *state* debt whatsoever, shall be issued, except for such debts as are authorized by the sixth and seventh sections of this article." Are county, town or city orders, evidences of a "state debt," and the issuing them a violation of this section? It can hardly be necessary to give a serious answer to such a question. Yet I cannot see why the affirmative might not as well be asserted, as to sustain the construction attempted to be placed on sections 3 and 10. Other provisions of the instrument also show such a construction utterly untenable. Thus, while sec. 3 of this article prohibits the state from loan-

its credit at all, yet section 3, of Art. IX, expressly recog-

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nizes the power of municipal corporations to loan their credit, and requires the legislature to properly restrict it.

The object of the prohibition in sec. 10, against the state contracting any debt for works of internal improvement, or being a party to carrying them on, does not require cities, counties and towns, to be included in the prohibition. The simple reason is, the object was only to prevent the state as a state, from becoming a party to such works, and not to prohibit the works from being carried on. It was simply a question how they should be carried on. The history of other states had shown, that for the state itself to engage in these works, involved it in difficulty and embarrassment, and that the works could be better prosecuted by private enterprise, assisted by such cities, counties and towns, as were in the vicinity of the improvement, and interested in its completion. Hence the constitution prohibits the state to become a party to such works, or to loan its credit, but contains no prohibition of a similar character with respect to these local corporations; and on the contrary, expressly recognizes their power to loan their credit, which must have contemplated their becoming parties in carrying on internal improvements, for it was for this purpose that this power in such corporations had been commonly exercised.

If this, then, is so; if the credit of a city is not the credit of a state, nor its debt a state debt, such acts are not liable to the objection of doing indirectly, what cannot be done directly. The thing that cannot be done directly, is to contract a state debt for works of internal improvement. If the legislature should attempt to authorize a city to contract a *state* debt for such works, that would be attempting to do indirectly what it could not do directly, as well as being a very great absurdity. But when it only allows it to contract a debt against itself, that is liable to neither objection. Nor is it liable to the logical objection of deriving power from a

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source where it does not exist. The state may have power to grant a power, and at the same time not have power to execute it. This is clearly shown by reference to this very prohibition against its being a party in carrying on internal improvements. No one doubts that it may authorize a railroad company to build a railroad. But it could not build one itself. And is that deriving power from a source where it does not exist? Clearly not. Because the state has the power to grant the authority, and is prohibited only from being itself a party in its execution. The difficulty with this objection is, that it confounds the power of granting a right, with the power of being a party to its exercise; whereas the two are essentially distinct. This is illustrated by reference to the king's prerogative of granting offices. See Bacon's Abridgment, Title "Prerogative, E," where it is said: "The king cannot execute any office relating to the administration of justice, although all such officers derive their authority from the crown, and although he hath such offices in him to grant to others."

But it is said that the object of these provisions was to protect the citizens from taxation for purpose of internal improvement. If that could be assumed, I see not how the law can be sustained, for its result might certainly defeat that object. But I see nothing in the instrument, I know of nothing in the history of its adoption that I think could justify me in assuming such to have been its intention. Other states had been parties to such works, and the people had been subjected to the taxing power to carry them on. In other states, towns, cities, and counties had aided in such works, and their inhabitants had been subjected to the taxing power in consequence of it. These facts were well known and understood by the framers of our constitution, many of whom, if not all, had come from older states, where these things had existed. Now if they had intended to pro-

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tect the people from the taxing power for internal improvements, why not say so? Why not say that no citizen should ever be taxed for such purpose? Why not say not only that the state should not be a party in carrying on such works, but that counties, cities, and towns, should not be? They knew that if the latter could be, the citizens might be taxed, and if the object was to prohibit such taxation, I cannot account for the entire failure, to use any language expressing it. This objection would also assume that the state might be a party to these works, if it could do so without a resort to the taxing power, which would be clearly untenable. I think therefore, when the constitution says the state shall not be a party in carrying on these works, it means simply that; and not that no citizen can ever be taxed to carry them on, which is a very different matter. The fact, also, before referred to, that the constitution expressly recognizes the power of municipal corporations to loan their credit, and the fact that these loans had commonly been made in aid of such works, and that if made, the citizens may, in consequence thereof, be taxed, seem to me to show, conclusively, that it was not the object of the instrument to prevent the possibility of taxation for such purposes.

But I think this whole objection is disposed of by the decision of this court in the case of *The State ex rel. Dean vs. The City of Madison*, 7 Wis. Rep., 688. It involved the validity of bonds issued by that city for public purposes. And it was claimed to be a violation of sec. 6, Art. VIII., of the constitution, which prohibits the state from contracting debts to exceed one hundred thousand dollars. It was held that this provision related to the debts of the state as such, not to those of its towns, cities, &c. If it be said that to allow these corporations to engage in such works, and to tax their citizens therefor, may result in as great abuses and evils as for the state to do it. This may be conceded, but it does not

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change the argument. The answer is, that even though it be so, the language of the constitution does not include these evils in its prohibition. As to them, it refers it to the legislature to adopt such restrictions as may be necessary to prevent them. In such restrictions, therefore, and in the wisdom and integrity of the people who act for themselves in administering the affairs of these corporations, is to be found the only remedy for such abuses. The constitution has not deprived them of the power.

But it is further said, that the building of a railroad is not a municipal purpose; and that, therefore, this act is invalid within sec. 1 Art. XI., which is as follows: "Corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, *except for municipal purposes*, and in cases where, in the judgment of the legislature, the objects of the corporations cannot be attained under general laws." This language is construed as a prohibition against investing a municipal corporation with authority for any purpose, except a municipal purpose. I do not so understand its object or effect. It seems obvious, on the face of the provision, that it is aimed at the evils of special legislation. The prohibition is against creating corporations by special act. From this prohibition certain kinds of corporations are excepted, among which are those for municipal purposes. The exception relates to the kind of corporations that may be created by special act, not to the purposes for which it is possible to invest a municipal corporation with authority. The question whether it is competent to give such a corporation, already in existence, authority for a purpose not strictly municipal, is not within the language of the clause, and obviously not within its scope or object. It is doubtful, also, whether this clause can, at best, be regarded as anything more than directory to the legislature, as it leaves the whole matter, after all, to its judgment.

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Neither am I certain that I should not hold the aiding of a railroad to be a municipal purpose, if I deemed that question necessary to be determined. I am aware there is a conflict of authorities on the point. But I think there is great force in the reasoning of those who hold that the general welfare, and commercial prosperity of cities, are so materially advanced by connecting themselves with one of these great arteries of trade and travel, as to make their construction a legitimate object of municipal enterprise. The fact whether the improvement extends beyond the limits of the corporation is sometimes made the test. But this is not entirely satisfactory to my mind. I can see no difference in principle, whether Milwaukee issue its bonds to build a harbor entirely within its own limits, but designed to open its marts to the commerce of the lakes, or whether Janesville, or any inland city, issue its bonds to build a railroad, extending beyond its limits, but designed to connect itself with that same commerce. The object is the same, the result on the prosperity of the city the same in both cases. But I shall not pursue this question, as I deem it unnecessary to a decision. I have thus referred to the objections to the validity of these bonds, with one exception; and were these the only objections, I should be prepared without any doubt on the subject, to affirm the judgment.

But there is one other, which though not urged by the counsel for the city, was yet discussed at length by the counsel for the plaintiff, and which, it seems to me, is necessarily involved in the case. That is, whether the charter of the city of Janesville, which authorized the issuing of these bonds, is a general law within the provision of the constitution, that such laws shall not be in force until published and if so, whether it was in force when they were issued.

In the Iowa county seat case, decided at this term, 9 Wis. Rep., 279, we held that a law providing for submitting to the

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people of that county the question of a removal of the county seat, was a general law, within this provision of the constitution. And the decision was placed partly upon the general public interest in the question involved, and partly on the fact that the act incorporated into itself the provisions of the general election laws, whereby any inhabitant of the state going into that county and illegally voting at the election would have been liable to punishment. In that opinion reference was made to several decisions in regard to public statutes. And it was said that we had no doubt the words, "general law," as used in this clause of our constitution, were intended to include the same kind of laws as the words "public acts," used in the laws and decisions referred to. The counsel for the respondent did not deny that the charter of Janesville was a public act, and this could not well be denied. In addition to the important bearing that such a charter has upon the interests of all inhabitants of the city, it also organizes a new political division of the state; it delegates a portion of the legislative power, and authorizes the common council to enact ordinances, having the force of laws, by which all the people of the state coming within their jurisdiction are to be governed, and are subjected to arrest, trial, and punishment. It provides for the collection of a portion of the state revenue, and incorporates into itself the general election laws, laws relating to the injury of bridges, &c., which apply as well to all the people of the state who should go there and violate them, as to those residing in the city; and the clear proceeds of the fines and penalties, collected under the ordinances of the city, or for violations of these general laws re-enacted in the charter itself, would go into the school fund, under the constitution, for the benefit of the whole state. It is indisputably a public act within all the authorities upon the subject. But the counsel for the respondent contends that there is a distinction between a public act

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and a general act; that all public acts are not general; and that the remark in the Iowa county case, that the words "general law" were designed to include all public acts, was too broad. There was nothing in the discussion in that case that suggested the distinction here claimed, and in such examination as I then gave it, no reason for it occurred to me; but if it exists, if that remark was too broad, and overlooked this distinction, I, for one, should not hesitate a moment so to declare.

But since the discussion of this case, I have carefully re-examined the question, and my opinion remains unchanged. I find that from the earliest times, the words "public" and "general," as applied to statutes, have been used as convertible terms. In Holland's case, Coke, pt. IV, 75, the question was whether the act involved was a public act, such as the court should take notice of. It is called "a general law, throughout the case. In the notes referring to other cases on the same question, statutes are spoken of as "public" and "private." In *Samuel vs. Evans*, 2 T. R., 569, the act in question is said in the head note to be a "public act." In the arguments of counsel, the decisions upon it are presented. Several of the judges had held it to be "a general law;" others, "a private law." And throughout the case, the words *general* and *public* are used as synonymous. Chancellor Kent, in his commentaries, Vol. 1, 506, classifies all statutes as "public or private;" and he says, "the most comprehensive, if not the most precise definition in the English books is, that *public acts relate to the kingdom at large.*" This is the precise definition claimed by the counsel for a general law, and is inconsistent with the distinction he asserts; for he was compelled to concede, that acts may be public which do not act territorially thoughout the state, if they are of general importance in their effect upon the interests of the people. And if such acts may be said to "relate to the kingdom at

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large," they fully come up to the idea of a general law; and so Kent says on the next page; "public statutes" are "a part of the general law of the land," &c. Again, in Stephen's commentaries, vol. 1, p. 67, he classifies statutes as "either public or private;" and he says, "*a public act is a universal rule, that regards the whole community.*" Both of these commentators evidently use the word public as synonymous with general.

So in Dwarris on Statutes, 629, it is said, "public acts relate to the kingdom at large;" and again, on 630, "a general or public act, then, regards the whole community;" using the words as synonymous; and also, "a private act, if recognized by a public act, must afterwards be noticed by the courts as a general law." In Sedgwick on Statutory Law, &c., p. 30, it is said the leading division of statutes is into "public or general, and private or special." And he then proceeds: "Public or general statutes are, in England, those which relate to the kingdom at large. In this country they are those that relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation, or by constitutional restraints." So in Bonvier's Law Dictionary we find "public" or "general" statute defined. And this use of the word is in accordance with common understanding, and the definitions of standard lexicographers. Webster defines "general" as meaning, among other things, "public," "common," "extensive, though not universal," &c. So one definition of "public" is "general." But I will not quote further. I think I have already shown that the word general, as applied to statutes, has an established meaning, synonymous with the word public; and that is sufficient for my purpose.

But it undoubtedly has other meanings. It is used as contradistinguished from local, and then it would mean operating over the whole territory of the state, instead of in a particular

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locality. It is used, also, as contradistinguished from special, and then it means relating to all of a class, instead of to one, or a part of that class. It has been used in the former sense in carrying out a more accurate and detailed classification of statutes. This is referred to in Dwarris, p. 629, where it is said that, "for convenience of citation," statutes have been further divided into "public general acts, and public local acts," &c. The word "general," here, is evidently used as the opposite to local, and the word public, used in connection with each, expresses the general character of the law, as distinguished from a private law.

Our own constitution furnishes an illustration of its use as the opposite to the word "special," in article XI, where it is said that corporations may be formed under "general, and not under special laws," except municipal corporations, which may be formed by special acts. It was assumed as very clear by other counsel, in the argument of another case, that an act organizing a municipal corporation could not, in view of this provision, be a general law, within the meaning of section 21, art. VII. He said it could not be special and general also. But I think this by no means follows. On the contrary, it is demonstrable that an act may be special, that is, relate to one of a class, and at the same time general, that is, of such extensive and general interest as to be a public law. Suppose an act organizes a judicial circuit; it is a special act; it relates to a judicial circuit, but not to all. But it will not be disputed that it would be a public act; and if public, then in the sense hereinbefore shown, general.

The word *general* in Art. XI, §§ 1 and 4, is clearly used only as opposite to *special*, and without any design of indicating the public or private character of the law. The evil aimed at was special legislation, and the whole object and scope of the provision shows that the word general, as there used,

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was confined to its restricted meaning as the opposite of special.

The question then presents itself, in what sense was it used in sec. 21, Art. VII, where it is said, "no general law shall be in force until published?" It is not used here in connection with the word "local" or "special." There is nothing in the context showing that it was used as contradistinguished from either. Among its various possible meanings, resort must be had to the object of the provision, to determine in what sense it was used. And the moment that is looked at, it seems to me to leave no room for doubt that it was used in its usual sense when applied alone to a statute, that is as synonymous with public. The object of the prohibition was the protection of the people, by preventing their rights and interests from being affected by laws which they had no means of knowing. But all are bound by, and are bound to take notice of public statutes. It was conceded on the argument, and could not well be denied that a large class of statutes are public, having the most important bearing upon the interests of large portions of the people, which are yet local in their immediate operation. If all these are excluded it is manifest that the object of this clause of the constitution is in a great measure defeated. And the people are liable to act blindly with reference to their most important interests, and to have their rights sacrificed by the operation of laws which they are bound to know, but have no means of knowing. Such a result is in conflict with the first duty which a state owes to its people. That the object of this prohibition was to prevent it I have no doubt. The language used is not only capable of a construction which will accomplish the object, but such is in accordance with its usual meaning, when used alone, as it is here, and not in connection with other words which may give it a more restricted sense. The question then is, shall it be construed in its usual meaning, and according to its obvious in-

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tent, or shall the court go beyond this provision and search out a more restricted sense in which the word is sometimes used, and upon that verbal pretext, limit its meaning here, so as to defeat half the object of the prohibition, for the sake of avoiding whatever consequences may result from its enforcement? For one I must adhere to the former course whatever may be the result.

It was argued as though the whole distinction between public and private acts was founded on a mere convenience in pleading, and as though acts were public because courts take notice of them. But the distinction rests upon a much more essential and important principle, and not only courts, but every body, are bound to take notice of them, because they are public acts. The fact that the legislature sometimes declares that a private act shall be deemed a public act and taken notice of by the courts, was supposed to have some bearing on the question. But I am unable to see it. Undoubtedly the legislature may, as a mere matter of convenience, provide that a private act shall, in some respects, be treated as a public act. But the constitution proceeds upon the essential characteristics of the acts themselves. And clearly, the legislature could not, by merely changing the name of an act, take it out of or bring it within the constitutional provision contrary to its essential character. But as no such question is presented, I can see no bearing which the common practice of saying that a private act shall be deemed public, has upon the question at issue.

I am compelled, therefore, to hold that the charter of the city of Janesville was a general law within the meaning of this prohibition of the constitution, and that it could not be in force until published. But it was also held in the Iowa county seat case that the publication which is to give force to a general law, must be one made under some provision of law. Not that the precise manner or time should be observed, but

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that it must be done under the law and by authority. And this position has also been assailed. And it was contended that any publication, such as reasonably notified the people, should be held to make the law operative, even though entirely without authority. But I cannot assent to such a position. On the contrary, I repeat what I said in that case, that where the constitution requires provision to be made by law for the publication of all laws, and then immediately says that "no general law shall be in force till published," it seems to me the publication mentioned in the latter clause, is obviously the one required to be provided for in the first. And no other rule is practicable. Courts and people are bound to take notice of general laws; and that upon which their operation depends, should be capable of being readily ascertained with the highest certainty. This can only be done by having it an authorized act, and the evidence of it preserved in pursuance of law.

It is said by counsel in his brief, that this charter was published in the newspapers at Janesville. But it is not pretended that there was any law authorizing it. And how is the court to know the fact? Is it to inspect all the newspapers in the state to know whether some individual has caused laws to be published? Is it to inquire whether they have been published in handbills, or in pamphlets? Is it even to inspect the newspapers of other states, some of which are extensively circulated here, to see if our laws have been published in them? And, even if they should be found printed in this way, how are the courts, or the people, to know that they are the laws? They would not come through an authentic channel of information, and it could only be known after all, that they were laws, by resorting to such channel. But it seems to me too clear to admit of doubt, that the publication which is to make a law operative, must be authorized by law. And I think there is no weight in the suggestion that, under this

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rule, no general law could ever have got into operation, for the reason that, until the first law was published, there would be no law authorizing its publication. This is the same objection made to the validity of the ordinance before noticed, and the same remarks apply to it. If a general law is enacted, and itself prescribes the manner of its own publication, if published accordingly, I should have no hesitation in saying that the publication was in pursuance of law. The publication would give validity to the law, and the law would give authority to the publication.

The charter of the city of Janesville was published among the Private Laws of 1853. The certificate of the Secretary of State attached to the volume, as required by law, is dated on the 4th day of October of that year. And we have held, at the present term, that, in the absence of any suggestion to the contrary, we should take the date of that certificate as the time of the publication. There is no claim that this charter was published by authority before that.

The election was held upon the question of subscribing stock in July, and the bonds and coupons were issued on the first day of August in that year. It was all done, therefore, without any law authorizing it; and within all the authorities is invalid. In *The commissioners of Knox County vs. Aspinwall*, before cited, the Supreme court of the United States say: "The act in pursuance of which the bonds were issued is a public statute of that state, and it is undoubtedly true that any person dealing in them is chargable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred," &c.

Here the authority fails, and the bonds were issued without law. And, for this reason, though regretting the necesity of deciding a case of so much importance upon such a ground, I think the demurrer should have been sustained,

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and that the judgment of the court below must be reversed, with costs.

DIXON, C. J. I fully concur with my brother PAINE.

COLE, J., dissenting. The constitutional questions presented by this record are substantially the same as those involved in the case of *Bushnell vs. The Town of Beloit*,* upon which I have expressed my views, in the opinion in that case. I have but little to add in the present case further than to observe that, to my mind, the argument in favor of the validity of the bonds mentioned in the complaint, and of the power of the legislature to authorize municipal corporations to make subscriptions to the capital stock of rail roads, in which the corporation may be interested, is greatly strengthened by the language used in section 3 of Article XI. of the constitution. By this section it is made the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses; thus recognizing in the clearest manner that a power may be conferred upon these corporations to borrow money, contract debts, and loan their credit for some lawful purpose. And if the inquiry is made for what purpose municipal corporations have found it necessary to borrow money and loan their credit, it cannot be said that it has been to defray the ordinary expenses of the local government. These expenses are almost invariably met by direct taxation upon the property within the corporation; or at least it is from this source that the revenue is generally derived. When, therefore, municipal corporations have loaned their credit, it has been done for the purpose of aiding some individual association or cor-

*See this case below.

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poration in constructing some works, or making some internal improvements, calculated directly or indirectly to benefit the city. It is for the accomplishment of objects of this character that municipal corporations have found it necessary to loan their credit and borrow money, and this was well understood by the framers of the constitution. And, since municipal corporations derived the power from the legislature to loan their credit for these purposes, the duty was enjoined upon the legislature in conferring the power so to restrict it as to prevent any abuse in its exercise. The power must be conferred in some degree before it could be restricted in any. But that it was not intended by the framers of the constitution to deprive the legislature of the power to authorize municipal corporations to aid in carrying on works of internal improvement, but to permit that authority to be granted, under such restrictions as to the legislature might seem proper, would seem to follow, in the clearest manner, from the language employed in this section. And in conferring upon the common council of Janesville power, by resolution, to authorize the mayor to subscribe stock for "any rail road running to or passing through the city," the legislature undoubtedly supposed that the limitations upon this power contained in the charter would effectually prevent any abuse in its exercise. The common council, in the first instance, had to submit to the legal voters of the city the question whether the city should take stock; giving at least ten days notice, in some newspaper published in the city, of the time and place of voting upon the question, stating the amount to be subscribed, &c. The election was to be by ballot, and if a majority of the votes cast upon the question was in favor of taking the stock, the common council, by a resolution which was required to be entered upon the city records, could authorize the mayor to subscribe for the city the amount of stock so voted to be taken. And as the concurrent action of

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the city authorities and people was necessary to authorize the subscription, it was but fair to suppose that no abuse would follow from conferring this power upon the corporation. The power to take the stock was subject to the will of the people directly affected by the indebtedness; and this was all the restriction the legislature deemed necessary to impose upon its exercise in the present instance. But the legislature must grant the power to municipal corporations to contract debts and to loan their credit before it could restrict or regulate the power conferred.

And without pursuing this line of remark further, I will only add, that it is apparent, as well from the clause of the constitution I am now considering as from the whole scope and spirit of that instrument, that the legislature were not inhibited from authorizing the authorities of the city of Janesville to make the subscription to the capital stock of the Rock River Valley Union Railroad, and to issue the bonds in controversy.

It was likewise insisted upon the part of the appellant, that the ordinance passed by the common council of the city, did not properly fix the place for submitting the question of taking stock to the legal voters of such city, and that due notice of the election was not given, &c. Upon an examination of the allegations of the complaint, I am not able to discover, but that the requirements of the charter in reference to holding the election, were substantially complied with, and the election appears to have been regularly and fairly conducted. At all events, if there were any irregularities in the proceedings preliminary to the issue of the bonds, I do not think any of those relied upon by counsel, are of such a character as ought to invalidate the bonds in question in the hands of an innocent holder for value. It is well known that bonds of this description are intended to be thrown into the market and sold, and it would be an inequitable rule to hold that

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they were void in the hands of a *bona fide* purchaser, on account of some defect in the notice of election, or some slight irregularity in conducting the same. See *Commissioners of the County of Knox vs. Aspinwal et al.*, 21 How. U. S., 539; *Fisher vs. The Morris Canal Banking Company*, 1 Stock, Ch. 667; *Mechanics' Bank vs. New York and New Haven Railroad*, 3 Kernan, 599; *The City of Bridgeport vs. The Housatonic Railroad Company*, 15 Conn. 475.

These cases clearly show what character has been given to this class of securities, and how far courts have gone in excluding defenses, where the suit was not between the orginal parties, which was grounded upon some defect in the notice of, or some alleged irregularity in the issue of the bonds. It is true, that the right of the common council to authorize the mayor to subscribe the stock, depended entirely upon the fact that a majority of the legal votes cast at the election, should be in favor of the subscription, but it is not to be presumed that the city authorities did not proceed according to law in ascertaining the will of the people upon the subject, and did not comply with the provisions of the charter authorizing the election. The complaint in the present case sets forth, with great fullness, the preliminary steps which were taken, and I cannot perceive but the city authorities substantially complied with the conditions to the grant of power to subscribe the stock.

The question was likewise made as to whether an action could be maintained upon the coupons described in the complaint, because the bonds to which they are attached are not drawn payable to bearer or order, but to the railroad company or its assignees. The bonds were assigned by the president of the company to ——— or bearer; and the coupons are made payable to the railroad company or bearer. These securities are of a peculiar character, designed to be thrown into the market for sale, to raise money upon, or to

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pass from hand to hand by delivery, and by common usage, are, in fact, so transferred. Though they may not be commercial paper, in the strict sense of the word, like bills of exchange, or promissory notes, yet they circulate in market much like those instruments, and are intended to answer much the same purpose. They can be transferred by delivery or assignment, so as to confer a complete title upon the holder, relieved from the equities existing at the time of the assignment, between the maker of the instrument and the assignor. *Morris Canal and Banking Co. vs. Fisher; Mechanics' Bank vs. New York and New Haven Railroad Co.; supra.*

In the case of *The Commissioners of Knox Co. vs. Aspinwall*, the court decided that a suit could be maintained upon the coupons without the production of the bonds to which they had been attached.

Although this action is brought to recover the amount due upon the coupons set forth in the complaint, still it appears that the bonds to which the coupons in question are attached, belong to the respondents. And under the provisions of our code, § 15, which requires every action to be prosecuted in the name of the real party in interest, I cannot doubt but that the respondents, to whom the bonds and coupons belong, properly instituted this suit, and are entitled to recover the amount due upon the coupons. See *Wookey vs. Pole*, 4 B & Al. 1; *Gorgier vs. Mierrile*, 3 B. & C., 45; *Lang vs. Smyth*, 7 Bing., 284.

Neither do I see any force in the objection that the subscription by the city for the stock of the company, was not made payable in installments, upon call, as required by section 6 of the charter of the railroad company. The city was, undoubtedly, authorized to make the subscription in the way it was made, and it would seem logically to follow from this fact, that the company was authorized to receive such

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subscription. At all events, if the charter required any modification to enable the company to make the contract, such modification was made by the city charter, which is full and complete for all purposes. *The City of Bridgeport vs. The Housatonic Railroad Company*, 15 Conn., 475.

Some further objections are taken to the validity of the bonds mentioned in the complaint, but I only deem one of sufficient importance to be noticed, and that is, whether the charter of the city of Janesville is a general law, within the meaning of the constitution of this state. It appears that before there was any authorized publication of the charter, the city government of Janesville was organized, and the election was held, at which the electors voted in favor of the common council making the subscription to the railroad stock, and for issuing these bonds; and it is contended that as the charter was a general law, it was not in force until published, and the subscription and election were unauthorized and void for this reason. The majority of the court have adopted this view of the character of the city charter, holding it to be a general law, and not in force until published, and from their conclusions upon this point, I am compelled to dissent. Where the act, in pursuance of which the bonds are issued, is a public statute of a state, I have no doubt but that any person dealing in them is chargeable with knowledge of it, and must take notice, whether the authority to subscribe the stock has been conferred. In this case the common council were acting under the city charter, and if that was not in force, it follows, of course, that their power to act did not exist. It is obvious that the question is not whether an irregularity has intervened in the exercise of the power to subscribe the stock, but whether any power, in fact, existed to make the subscription.

Is, then, the charter of the city of Janesville a general law, within the meaning of section 21, of Article VII., of the con-

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stitution of this state? That section reads as follows: "The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions made within the state, as may be deemed expedient. And no general law shall be in force until published." The argument mainly turns upon the force which is given to the words "general law," as used in this section. The majority of the court consider that the word "general," here employed, should have the signification and meaning as is given to the word "public," by authorities, when speaking of the classification of statutes. It is not to be denied, that many authorities use the words "general" and "public," when applied to statutes, as being synonomous, and strictly convertible terms.

In the case of *The State of Wisconsin, ex rel. Cothren vs. Lean*, decided at the last term, 9 Wis., 279, where the question raised was whether the act of the legislature, providing for the removal of the county seat of Iowa county, from Mineral Point to Dodgeville, in case a majority of the legal voters of the county voting upon the question, should be in favor of the removal, was a general statute, and we held that law to be a general law, and not in force until published. Although I concurred in the decision in that case, yet I had difficulty in arriving at the result reached by my brethren, and I am free to admit, that my doubts as to the correctness of that decision have been strengthened rather than removed by subsequent reflection upon the subject. It is by no means clear to my mind that the "general law" spoken of in the provision of the constitution above cited, is not a law which affects all the citizens generally, and operates territorially over the whole state. The law providing for the removal of the county seat of Iowa county, or the charter of the city of Janesville, is unquestionably a public act, expressly made so by a clause declaring them to be such.

But a distinction is made, and to my mind may well exist,

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between public general acts, and public local acts. Smith, in his Commentaries upon Statute and Constitutional Law, § 797, p. 914, says: "In parliamentary language, another sort of distinction is also usual, and some acts are called public general acts, and often others, public local acts, such as church acts, canal acts, &c. These in their objects and operations, are merely local, or limited, but they are, nevertheless, treated as public acts, either by virtue of a special clause, declaring them to be so, or because, although limited to a particular section, or locality, yet they affect the public at large, when acting within that section or locality, in reference to matter within the purview of the act. To this class may also be added some acts which, though public, are merely personal, such as acts of attainder, and patent acts, and all that class of acts which have for their object the security of the right of some particular individuals or class of persons, but which, in effect, are operative and of binding force upon all the citizens generally." The distinction here pointed out is, to my mind, rational and proper, founded in the nature of things, and I think should be adopted. Particularly do I deem it applicable to the laws of this state, when we bear in mind the construction placed upon this clause of the constitution by the legislature, and the officers of the government, in the classification and publication of the statutes, since the organization of the state government. The legislature provided, § 2, sub-division 22, chap. 4, R. S., 1850, that all acts of incorporation shall be deemed public acts, and as such may be declared on, and given in evidence without especially pleading the same; and as a matter of fact, most of the acts passed by the legislature contain a clause declaring that they shall be deemed public acts.

Further, in conformity to law, the statutes have for some years been published in two volume; those of a general nature in one, and those of a local character in another. And

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although the latter class have mostly been declared to be public acts, still the understanding of the officers and people of the state has been that they were not general laws, which came within the provisions of the constitution. Hence cities and villages have been organized, officers elected, taxes levied, real estate purchased and conveyed, and other obligations incurred, before there was any authorized publication of the acts of incorporation. Now if all these statutes, which elementary writers and courts have declared to be public laws, are held to be general laws within the meaning of the constitutional provision, and were not in force until published in some authorized manner, it is difficult to foresee the confusion which will arise, or the serious consequences which will follow from such a construction.

But there is another clause of the constitution which has a very important bearing upon this question, and shows most conclusively to my mind, that the charter of the city of Janesville is not a general law, within the meaning of that instrument. I refer to section 1, Art. XI, which reads as follows: "Corporations without banking powers or privileges, may be formed under *general laws*, but shall not be created by *special act, except for municipal purposes*, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage." This is the whole provision, and it seems to me little more need be said to show that a charter of a city is not a general law, than to quote this language. The section declares, in substance, that corporations shall be formed under general laws, except those for municipal purposes, which may be created by special act. But what is understood by the language, a municipal corporation created by a special act? What is the special act referred to? Is it anything different

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from a city charter? Does not the special act here referred to, mean those laws of incorporation granted by the legislature to villages and cities for police and governmental purposes? Is not this the plain, obvious, universal understanding of the language? These questions suggest their own answers. The framers of the constitution, then, evidently contemplated that municipal corporations would be created by special act, in other words, by charters. General acts might be passed, applicable to all villages, and cities, like the general banking law, or plank road law, but it was doubtless supposed that there might be some details or some peculiar provisions which could not be well comprehended in a general law, and that special acts of incorporations would therefore become necessary. Hence the exception that charters or special acts of incorporation for municipal purposes might be passed, and those special acts are spoken of in this section, and placed in immediate connection with, and are used in direct contradistinction to the general laws mentioned in the same section. If a city charter is held to be a general law, then it is difficult to give this section any rational construction. I am not aware that there are peculiar provisions in the charter of the city of Janesville, which distinguish it from other city charters in this and other states. It is quite probable that it differs in some unimportant particulars, but the main, leading features of these city charters are the same. I have no doubt, but it is substantially such an act of incorporation as the framers of the constitution had in view when they speak of special acts in this section. It is the special act "creating a corporation for municipal purposes," which the legislature was authorized to pass.

Holding, therefore, that the charter is not a general law within the meaning of the constitution, the clause in reference to the publication of general laws does not apply to it. I have no doubt but that the organization of the city government of

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Janesville, and the election held under the charter, at which the people voted in favor of the common council making the subscription and issuing the bonds in controversy, were all regular and proper.

I therefore think the order of the circuit court, overruling the demurrer, should be affirmed.

BUSHNELL *vs.* BELOIT.

APPEAL FROM CIRCUIT COURT, ROCK COUNTY.

Heard October 12, 1859.] [Decided January 4, 1860.

Constitutional Law—Corporations—Coupons—Assignment.

An act of the legislature authorising the town of Beloit to subscribe for the stock of a railroad company, and to incur indebtedness for making internal improvements, is a valid act; and the corporation is liable for the payment of such indebtedness.

The courts will not declare an act of the legislature authorising a municipal corporation to subscribe for stock in a railroad company, unconstitutional solely on the ground that such legislation is not wise and wholesome, but is evil and pernicious in its consequences.

The evident intent of Art. VIII of the constitution of Wisconsin in restricting the legislature from contracting state indebtedness for works of internal improvement, applies only to the state finances, and was not designed to regulate those of the towns, counties and cities, or to restrain them from loaning their credit in aid of such works; but these, when properly authorized, may contract such indebtedness, and become parties to such works.

A town, city or county, may give or lean its credit in aid of a corporation, without the credit of the State becoming pledged in any way thereby. The indebtedness would be that of the town, &c., and not of the state.

It is a well settled political principle, that the constitution of a state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature; and it is competent for the state legislature to exercise all legislative power not forbidden by its own constitution, or that of the United States, or delegated to Congress.

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The state legislature may authorise that to be done by another which the state cannot itself do, by reason of a prohibition in the constitution. This principle is based upon the unrestricted power in the legislature to create corporations, or allow individuals to do acts inhibited to the state to engage in. Art. IX of the constitution of Wisconsin is consonant to this principle.

The case of *Peck vs. Norton*, 3 Wis., 714, alluded to and approved.

Section 3, Art. XI, of the Constitution of Wisconsin, clearly recognizes the principle that municipal corporations may be clothed with power to "borrow money," "contract debts," and to "loan their credit." The fact that it was required by the legislature to restrict the power of these corporations in these respects, is evidence that the power existed; as a power cannot be restricted unless it exists.

The constitution of Wisconsin neither expressly nor by any fair implication, prohibits the legislature from granting the power to towns, cities and counties, to subscribe for the stock for the construction of railroads in which they are interested, and to issue their bonds therefor.

An act which authorized a town to subscribe for the stock of a railroad, is sufficient authority to the railroad company to receive the subscription and to take the bonds of the town as pay for the stock.

A power in a town to issue bonds to pay for stock in a railroad, carries with it the incidental power to issue them in a negotiable form, and to give them the character belonging to that class of securities in the market.

This action was brought to recover interest on coupons attached to town bonds issued by the town of Beloit, for the purpose of aiding the construction of the Racine and Mississippi railroad. The bonds were issued under an act of the legislature, approved February 10th, 1853. Sess. Laws, 1853, 12.

The 1st section of the act provided that "The board of supervisors of the town Beloit are hereby authorized to subscribe for the town of Beloit, one hundred thousand dollars to the capital stock of a railroad company authorized to construct a railroad from the city of Racine to the village of Beloit, and to pay for the same in the bonds of said town, payable in twenty years with interest, payable annually, in the city of New York, not exceeding seven per cent." Section 5 provided "no bonds shall be issued in pursuance of the provisions of this act, until a majority of the legal voters of said town, voting upon said question, shall vote in favor of the same at an election called for that purpose, to be held in the village af Beloit. At such election, those voting in favor shall vote a ballot with the words inscribed thereon, 'for the railroad;' and those voting against, shall vote a ballot with the words inscribed thereon, 'against the railroad.' One week's

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previous notice of said election shall be given in a public newspaper printed in the village of Beloit; and this act shall be published in connection therewith. Said election shall be conducted, and the returns thereof made and canvassed in the same manner as the annual town meetings of the said town." The act also charged the stock of the town with the payment of the principal of the bonds, and required the town to levy taxes from time to time, sufficient to pay the interest.

The suit was brought to recover from the town the amount due upon a coupon attached to one of the bonds issued to the railroad company and assigned to the plaintiff, and for value, and without any actual notice of the defense of the town, and upon an answer putting the liability of the town thereon in issue, the trial in the circuit court proceeded. On the trial it was proved that that the following "election notice" was published in the "Beloit Journal," on the 31st of March, 1853:

"An election will be held at Burrough's Hall, in the village of Beloit, on Thursday, the 7th day of April next, to commence at nine o'clock A. M., for the purpose of determining by a vote of a majority of the legal voters of the town of Beloit voting at such election, whether the board of supervisors of the town of Beloit shall subscribe for the town one hundred thousand dollars to the capital stock of a railroad from the city of Racine to the village of Beloit, and to pay for the same in the bonds of the town, in pursuance of the provisions of the foregoing act of the legislature of the state of Wisconsin. [Signed by the Supervisors.]

"Dated March 28th, 1853."

The same newspaper contained the act of the legislature authorizing the town of Beloit to aid in the construction of the road, &c. The record of the election in accordance with the notice, was also proved, showing that the whole number of votes cast were 388, for the railroad 321, and against the railroad 67; making a majority of 254 in favor of the subscription to the stock of the railroad. On the 5th of October, 1853, the supervisors of the town passed a resolution to issue town bonds numbered from one to fifty, for $1,000, and from 51 to 150, for $500 each; making $100,000, and to deliver them to the Racine and Mississippi R. R. Co.

On the 8th of March, 1853, the railroad company passed a resolution to accept the bonds of the town for the stock of the

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road, to the amount of one hundred thousand dollars, payable in the bonds of the town of Beloit, running twenty years, bearing 7 per cent. interest, payable annually in the city of New York, and conditioned that the road from Racine to Beloit be one division, and the stock therein a distinct stock; and also conditioned that the company provide for the payment of the interest on said bonds for said town until the completion of the road to Beloit.

On the 7th of October, 1853, the railroad company passed a resolution instructing their president to accept the town bonds, and deliver the stock of the road therefor; which he did. The stock bears date October 3, 1853. On the 21st of May an agreement was entered into between the town and the railroad company, and signed and sealed by the supervisors and the president of the company, as follows:

"An agreement made and entered into this 21st day of May, 1853, between the town of Beloit, by John Easterly, George B. Sanderson, and Allen Warden, the Board of supervisors of said party of the first part, and the Racine, Janesville and Mississippi Railroad Company, party of the second part. Witnesseth.

"*Whereas*, The Board of Supervisors of the said town of Beloit subscribed for and in behalf of said town, for one thousand shares of the capital stock of said company, by an article of subscription, dated this day, in pursuance of an act of the Legislature of the state of Wisconsin, entitled 'An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10, 1853. Now, in consideration of said subscription, by the town of Beloit aforesaid, and of one dollar in hand, paid by the party of the first part to the party of the second part, the said party of the second part doth hereby covenant and agree to and with the party of the first part, as follows:

"*First*, That the bonds of said town of Beloit, to be issued for the amount of said subscription, shall in no case be sold in market for less than 95 cents on the dollar, without the consent of the Board of Supervisors of said town, or their agent.

"*Second*, That the amount of said subscriptions, as soon as realized, shall be expended upon that portion of said railroad commencing at Beloit and running east to Delavan.

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"*Third*, That said company will pay all interest that may accrue on said bonds, up to the time said railroad shall be fully completed to Beloit.

"*Fourth*, That the stock subscribed by the town of Beloit shall be entitled to at least one Director in the Board of said company.

"*Fifth*, That the stock owned by the town of Beloit shall in no case be merged in the stock of any other road, branch, or corporation, whatever, nor be liable to any assessment for any liability or contract of the said company with any other road, branch, or corporation, without the consent of the said town of Beloit, unless the said railroad company shall take, or offer to take the said stock off from the hands of the town of Beloit, at its value in the market, not below par.

"In witness whereof, the Supervisors of the said town, in behalf thereof, have hereunto set their hands and seals, and the said company, by its President and Secretary, has also signed the same, and caused the seal of the said company to be hereunto affixed, the day and year aforesaid."

On the seventh day of October, A. D. 1853, the agreement was ratified and confirmed by the railroad company, by resolution passed by its Board of Directors.

The subscription is as follows:

"In pursuance of an act of the Legislature of the state of Wisconsin, entitled, 'An Act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit,' approved February 10th, 1853, and in pursuance of a vote of the electors of the said town of Beloit, given at a special meeting of said electors, duly called and held in pursuance of said act, at Burroughs' Hall, in the village of Beloit, on Thursday, the seventh day of April, 1853, at which meeting 321 votes were cast 'for the railroad,' and 67 votes were cast 'against the railroad,' we, the undersigned, constituting the Board of Supervisors of the town of Beloit, do hereby subscribe for, and on behalf and in the name of the said town of Beloit, for one thousand shares of the capital stock of the Racine, Janesville and Mississippi Railroad Company, to be paid in the bonds of said town, payable in twenty years, with interest, payable annually, at 7 per cent., in the city of New York.

"Dated, May 21, 1853." (Signed by the Supervisors.)

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It was admitted on the trial that the act had not been properly published, in the "Beloit Journal," and that the railroad company had violated the provisions of its agreement with the town, in all its particulars.

The following is a copy of bond No. 95, mentioned in the complaint:

"BY SPECIAL AUTHORITY OF THE STATE LEGISLATURE.

"*United States of America, town of Beloit, state of Wisconsin.*

No. 95. $500

The town of Beloit acknowledge themselves to owe to the Racine, Janesville and Mississippi Railroad Company, the sum of five hundred dollars, for five shares, of one hundred dollars each, in the capital stock of said company, subscribed for and purchased of said company by said town; which sum said town promise to pay to said company, or to the holder hereof, at their office, in the city of New York, on the 10th of February, 1873, and also interest thereon, at the rate of 7 per cent. per annum, payable annually, on the 10th day of each February. And it is further agreed that this obligation, and all rights and benefits arising therefrom, may be transferred, by general or special endorsement, or by delivery, as if the same were a note of hand, payable to bearer.

"In testimony whereof, the Board of Supervisors of said town have caused to be affixed its corporate seal, and these presents to be subscribed by their Chairman, and attested by the Clerk thereof; this 21st day of May, 1853.

"Attest: M. V. PASCO, Clerk.

[L. S.] JOHN EASTERLY, Chairman."

"I, M. V. Pasco, Clerk of the town of Beloit, do hereby certify that the foregoing obligation is issued in pursuance of a special act of the Legislature of the state of Wisconsin, entitled 'An Act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit,' approved February 10th, 1853, and sanctioned by a majority of the legal voters of said town, at an election held for such purpose, April 7th, 1853.

"M. V. PASCO."

Attached to this instrument were twenty coupons, for the payment of interest annually, on the 10th day of February in each year, from the 10th day of February, 1853, and the form thereof was and is as follows, to wit:

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"The town of Beloit will pay thirty-five dollars, on the 10th day of February, 1873, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number ninety-five, issued to said company.

"By order of the Board of Supervisors.

"W. W. DEXTER, Treasurer."

The coupons upon which this action is based, were duly presented at the place of payment therein specified, and payment thereof duly demanded, and payment was then and there refused.

Upon these facts, the circuit judge, who tried the case without a jury, found as follows:

This cause having been fully heard by me, I hereby find, as matter of fact, that all the allegations in the plaintiff's complaint are established by evidence, and are true:

And, as a matter of law, find that the plaintiff is entitled to a judgment against said defendant for one hundred and sixty-two dollars and seventy-eight cents, and costs.

Dated, December 24th, 1858.

By the Court, A. SCOTT SLOAN, Judge.

In pursuance of the above finding of the Court, judgment was entered for the plaintiff, and against the defendant, for the sum named in such finding, and costs of the action; and from which the town appealed to this court.

The counsel for the parties in this court relied on the same points and authorities as in the preceding case of *Clark vs. The City of Janesville.*

J. H. Knowlton, for the appellant, relied upon the following argument, in support of the defense set up:

There are two insuperable objections to the constitutionality of the act. The plaintiff claims: 1. The act imposes a tax, and creates a charge upon the stock contemplated, but was not passed by yeas and nays. 2. It authorizes the town an *integral part* of the state, in its governmental capacity, to become a stockholder or *party* in the construction of a work of internal improvement, and to create a debt for that purpose; and enforce taxation to obtain money for the payment of that debt, when by the constitution the *whole*

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state could do no such thing. As to the first point, sec. 8, Art. VIII., constitution reads: "On the passage in either house of the legislature, of *any law* which *imposes a tax*, or creates a *debt* or *charge*, the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three-fifths of all the members elected to such house, shall, in *all such* cases, be required to constitute a quorum."

The term, *any law*, includes all laws. Any law upon subjects particularly mentioned, includes all of the classes enumerated. The category is, exhaustive. So that there can be no law passed under our constitution which imposes a tax, or creates a debt, or charge, unless the question on the passage of the bill is taken by yeas and nays, and entered on the journal. Nor can this be done by less than a majority of *three-fifths* of all the members elected to each house. Nor less this three-fifths vote on the question. There is no power to pass such law in any other than the way prescribed in this section. This act *imposes a tax*, and therefore falls within this section of the constitution, and is void because not passed by yeas and nays. This may be seen by referring to the journals. Senate Journal, 1853, 109; Assembly Journal, same year, 163.

Can the legislature authorize a debt to be created in a manner different from that in which it could create the same debt? Clearly not. Because, if this could be done, the provisions of the constitution requiring legislative power upon given subjects, to be exercised in a manner prescribed, could always be disregarded. This would render the words of the constitution nugatory, if not meaningless. This dangerous concession cannot be allowed. But however this may be, as to the creation of a debt or charge, there is no doubt that the act, in the most direct language, imposed a tax. Every holder of these town bonds is bound to know whether the town had lawful authority to issue them. If there was a lack of lawful power, the bonds are void; and no amount of ignorance of the want of power, can entitle a party to recover upon them. It is like a deed executed by an apparent attorney under a forged power. No title nor estate could pass by such a deed, because there would be a want of power to that end. The face of the bonds show that the town officers professed to act under a special authority. Every holder can, and at his peril must, find out whether that special power did in fact, and in law exist. If the enactment was unconstitutional, then the power did not exist.

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Suppose the town officers should levy a seven thousand dollar tax for the annual interest on these bonds, must they not say "*this act imposes the tax*, and makes it our duty to levy and collect it? Clearly this is their only warrant. But the tax-payer replies, "it is admitted that by the language of the act the legislature imposes the tax, and makes it your duty to levy and collect it; but that act was not passed by yeas and 'nays, as required by the constitution, and is, therefore void. Without voting in this manner, the legislature had no power to pass the act. You, therefore, have no power or duty in the premises." Can there be any doubt that the tax-payer would be right, and that the act, bonds, and tax, would all be void? We think not.

The constitution having made the journal the *record evidence* of how such laws are passed, there is no other way of ascertaining this fact, than by consulting this repository. *Purdy vs. The People*, 2 Hill, 34; S. C. in 4 Hill, 390; 14, Ill., 297.

The constitution clearly protects every person from the payment of any tax which the legislature may impose, unless the enactment under which the right to tax is claimed, is passed by yeas and nays. It also necessarily follows that there is an inhibition upon all to do any thing whatever which may result in taxation under an enactment not thus passed. The inhibition extends to all laws which impose a tax, whether the imposition is co-extensive with the boundaries of the state, or is confined to some local sub-division, makes no difference. The mandatory injunction is co-extensive with the power to impose taxes. The effect of the declaration is, that in all cases where the legislature have the power to impose taxes, they shall only exercise it in voting by yeas and nays. On the first point, therefore, the act must be held unconstitutional and void.

On the second point, the constitution, Art. VIII, sec. 10, declares that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works." If the legislature cannot exercise power for either purpose, can that body enable different parts of the state, in their political and governmental capacity to do so? This proposition can only be maintained by establishing the position that power can be obtained from a source where it does not exist. It cannot be doubted that the object sought to be attained by prohibiting the state from contracting any debt

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for works of internal improvement, was to completely protect every person from the payment of taxes for the construction of such works, or on account thereof. Taxation can only be imposed or enforced by the exercise of sovereign power in the enactment of laws and the execution thereof. This being so, it conclusively follows that the inhibition is upon the legislative power to pass any law or act, for or on account of works of internal improvements, which, when carried out or executed, will result or ultimate in taxation. This being so, no man can be compelled to pay taxes for the construction of any railroad or canal. Where the legislature have not the power to impose a tax upon all the tax-payers of the state, by a law co-extensive with its territorial limits, they cannot as to such specified object, impose a tax which shall be binding upon a minority of tax-payers, or upon all who reside or own taxable property within territorial limits less than the whole state.

If this can legally be done, then it is clear that the constitution is no protection to a miniority. The great object of written constitutions is to protect minorities against the power of the majority. Unless this object is maintained *intact*, constitutions are of no earthly use.

Our constitution either does or does not operate upon and protect *each* individual the same as it does all others of the body politic. If it does not, it is discriminative and partial. If it does, the reverse is the case. If then, it is not partial and discriminative upon this subject, all may be taxed for works of internal improvement, or else no person can be. In other words, what cannot be done upon this subject as to all, cannot be done as to one, or any number less than all. Can it be shown that it was not the intention of the framers of the constitution, and of the people in adopting it, to protect all, from the payment of taxes for works of internal improvement, or in other words, was not, and is not this the intention of the above recited inhibitory words?

The state cannot contract any debt "for works of internal improvement, or be a party in carrying on such works," for the reason that either would involve taxation. The sole essence of the provision is to prohibit taxation for such works. The state in point of territory includes all the towns as its parts. The whole sovereign power cannot authorize, or create a debt for such purposes. How then can a part of a state do so? This cannot be done, unless a part of the sovereignty has more power than the whole. But the state is, by the very

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words of the constitution, prohibited. A prohibition of the whole must be a prohibition upon all the parts of that whole. Without special authority conferred, no town can subscribe for such stock in any railroad company, or contract any debt for the construction of a railroad, or be a party in carrying on such such work. No town can have such power unless it can be, and is derived from the state. By the constitution, the state is prohibited from doing any of these things. The town to have the power, must get it from a source where it does not exist. Both the town and state are destitute of this power. The act in question, therefore, presents the anomaly of two powerless bodies creating a power.

Judge Ranny, in *Cass vs. Dillon*, 2 Ohio St. R., 632, says: "The third section of the same article provides: Except the debts above specified, in sections one and two of this article, no debt whatever shall hereafter be created by, or on behalf of the state.

"Sec 4. 'The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state or elsewhere, formed for any purpose whatever.'

"Sec. 5. 'The state shall never assume the debts of any county, city, town or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war.'

"And again, in the article on finance and taxation, (art. 12, sec. 6,) still bearing in mind that the embarrassments of the state have mainly arisen from indebtedness incurred for internal improvements, and apparently to make assurance doubly sure, it is declared: 'The state shall never contract any debt for works of internal improvement.' The chief object of these provisions, in their application to the state government, are too manifest to require comment. In the most explicit and cogent language, they prohibit the state from contracting or assuming, either directly or indirectly, any indebtedness whatever, except for the purposes allowed in the first and second sections of the 8th article. And the fourth section of article 8 is equally explicit in denying the right of the state to become a joint owner or stockholder in any company, for any purpose whatever.

"The moment the constitution took effect, all legislation

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then existing authorizing the creation of any such liability, it is admitted, was instantly repealed, and the authority revoked. But, it is claimed that these sections only operate to restrain the state government, as their representative of its sovereignty, from assuming liabilities to bind the whole state, while they leave its *political* divisions under authority of law, free to construct public improvements, and if necessary, and deemed expedient, to incur any amount of indebtedness for that purpose.

"It is wholly unnecessary in the decision of this case, to determine this question, since the particular form of indebtedness here attempted to be incurred is, in my opinion, expressly prohibited by the 6th section of the 8th article, to which I shall particularly allude in the further progress of this opinion; and I have introduced the sections already quoted, chiefly for the purpose of showing the great care evinced by the convention to put a final end to what was justly regarded a formidable evil. But if the position is tenable, it must be admitted the constitution contains no guaranty whatever to the tax payers, against being involved in indebtedness to any extent for internal improvements, through the medium of counties, except in the particular mode of loaning their credit, or subscribing to the stock of corporations. I am therefore unwilling to pass it in silence, or to suffer the opportunity to escape without saying that I am very far from yielding it my assent. I should hesitate long before coming to the conclusion that the great object of these provisions could be thus easily and obviously evaded. I may admit that the precise import of the language employed, where the letter only is regarded, may be open to this narrow construction.

"But the construction of a penal statute, and a remedial legislative enactment, or constitutional provision, involve very different considerations; and this case, throughout, furnishes another and forcible illustration of the absolute necessity, in the latter class of cases, of comprehending clearly the spirit and object of the provision, and of holding that cases within its *equity* are included within it, and governed by it.

"However sagacious and intelligent legislators may be, no human intelligence can foresee the infinite variety of circumstantial variation that may arise in cases to which the reason of the rule extends; and however voluminous a code of laws may be, such cases can never all be subjected to a precise description.

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"If this be true of statutory enactments, how eminently so of constitutional provisions, necessarily expressed with brevity, and designed to declare great principles, in the fewest possible words?

"To the judicial tribunals belongs the duty of applying these to individual cases, often a work of difficulty, and requiring the exercise of the highest powers of judgment and discrimination; and in the discharge, duty, the polar star to guide the judicial mind, should be the object intended to be accomplished by the provision. And it should be so construed as to preserve this in full vigor, unimpared by evasion, although in doing so the letter may not be strictly adhered to.

"Now, what object was intended to be accomplished by prohibiting the state from contracting 'any debt for purposes of internal improvement?' The answer is plain, palpable and undeniable, that it was designed to protect the people of the state from the delusion, embarassment and onerous taxation to which they had before been subjected. It was not the state as a mere ideal abstraction, unconnected with her citizens and her soil, that needed protection; but the state, as composed of her people, and their territorial organizations of towns, cities and counties of which it was made up. It was not the name of a state debt against which it was intended to guard, but the burthens which such a debt imposed upon the property of the citizens of the state. It was not the particular form in which the liability might be incurred, or whether its payment was imposed upon all or only a part of the people; but it was intended to give every citizen a constitutional guaranty that no debt was to be contracted for that purpose which might ultimately involve taxation for its payment, and to afford him a sure protection against the unwelcome visits of the tax gatherer, calling for money to pay such indebtedness, that this section was inserted.

"Upon any other construction, it is scarcely worth the parchment upon which it is written.

"For, if the legislature may authorize one county to incur such indebtedness, it may authorize all; and if it may authorize them to do it, it may, with still less doubt, require it to be done. And in this way a debt to any amount may be contracted under its authority, for a prohibited purpose, with its burden imposed on all the property of the citizens of the state, and subjecting them to the same oppressive taxation as

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though the same was assumed directly by the state. The provision would thus wholly fail to effectuate its manifest and substantial objects, and its protection be reduced to a mere shadow; since it would matter little to the tax payer whether his property was taken to pay a debt for that purpose, nominally incurred by the county or state.

"The construction for which I contend is entirely consistent with the language of the section, and I think demanded as the result of the principles already settled in this court. The legislative power of the state, in the exercise of sovereign authority, can alone authorize the construction of internal improvements. A county is invested with no single attribute of sovereignty, and, under the constitution, cannot be.

"When its organization is employed for carrying into effect a law of that character, it is used as a mere instrumentality, a means in the hands of the legislative power to accomplish its purposes, and can do nothing but execute some subordinate function. 1 O. State R., 89, 95.

"In virtue of its own powers, therefore, a county cannot construct these improvements, and, of course, cannot contract a debt for the purpose. If a debt is contracted, it must, from the nature of the thing, be contracted by the state through its legislative department, whether the payment of the debt is imposed upon the state, or a county; or, in the latter case, whether it is voluntarily assumed by the county or forced upon it. What the state cannot do directly, it certainly cannot do indirectly.

"Constitutional and statutory provisions and legal rules would become little less than a burlesque if they possessed so little vitality as to be subverted and made powerless by indirect attacks upon the principles they are established to sustain.

"Now, it is positively declared: 'The state shall never contract any debt for purposes of internal improvement.'

"It is by no means clear that the precise language of the section is not invaded when a debt is authorized or commanded by the law-making power of the state, for this purpose, although its burden is cast upon one or more counties. But, if it is not, is it not a sheer and palpable evasion of the spirit and purpose of the provision, to allow the same object to be attained by the use of interdicted means, imposing the same burden upon a part or all of those intended to be pro-

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tected, and followed by the same oppressive taxation? I think it is; and such was evidently the opinion of the court of appeals in Kentucky, in the case of *Slack et al. vs. Maysville & Lexington R. R. Co.*, 15 B. Monroe, upon a provision of the constitution of that state, much less explicit than this, although it did not become necessary in that case definitely to settle the question.

"If it is so, and if the constitution, in protecting the people of this state from this evil and oppression, has necessarily protected all its organized parts, and every individual citizen, it follows that this attempt to create a debt for internal improvements, under legislative authority, is inoperative and void, as it stands confessed that this provision of the constitution was absolute and imperative, from the time the instrument took effect. If this is not the true construction, the next fitful fever that seizes the legislative body, may, with the utmost facility, plunge us into another twenty million debt, and call for another half century's endurance, by apportioning its burden upon the counties of the state, and calling it the debt of the counties, instead of a state debt; notwithstanding the utmost anxiety is everywhere apparent to prevent such a result."

Again, on page 641, the same judge, speaking of the Clinton county case, says: "The corner stone upon which the opinion is based, is found in the fact that the General Assembly was invested with express authority to construct internal improvements, and unrestricted in its choice of instrumentalities and means, to attain the end. A county, it was held, might be employed as such instrumentality, and indebtedness and taxation, as lawful means, at the time the power was exercised, and the obligation incurred by the subscription.

"But everything was made to depend for its validity and force upon the exercise of the sovereign power with which the legislative body was clothed, at the time the acts were done; and which it could neither delegate nor surrender. Here, the same acts are attempted to be performed, and the same obligations incurred, under the legislative authority of a government, not thus unrestricted in its choice of means, but expressly prohibited from authorizing what has actually been done."

This reasoning of Judge Ranny has not been, and it is believed that it cannot be answered. The majority of the court

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seem to admit that this construction was correct. They simply decide that the legislative act in question, having become law under their old constitution, was not abrogated by the taking effect of the new constitution.

Upon examination of the numerous cases which have been decided in the various states, sustaining the constitutionality of legislative acts, it will be seen that they are all based upon the fact, that the state in its sovereign capacity, had the power and authority to become a party, or to be the sole party in the construction of the specified works of internal improvement, with full power to create debts therefor, and to enforce the payment of taxes to obtain the money to satisfy such debts: That the state was in no way restricted as to the manner, the locality, or time when these powers should be exercised. In other words, as to this whole matter, the will of the legislature expressed by legislative enactment, was the measure of state power. That, as a consequence thereof, towns, villages, cities, and counties, might be used as instruments for the execution of this governmental power. That taxation is the exercise of one of the highest of governmental powers cannot be doubted.

Without any elaboration of this proposition, we will assume that it is correctly stated. Towns, villages, cities, and counties, must exert governmental power in the collection of taxes, in order to get money to pay debts contracted for the construction of works of internal improvement. This conceded, how stands the matter if the act in question can be sustained? Clearly in this wise. The whole state cannot exercise the governmental power of creating debts, and enforcing the payment of taxes, for purposes of internal improvement, in and of itself, and in its own name; but with the aid of some part of the state, and in the name of such part, the power may be exercised, in more or less rapid succession, until all the parts become instruments in accomplishing what the whole is prohibited from doing. When all the parts have thus lent their helping hand, they do what the whole cannot do, because prohibited by the constitution. What cannot be done by the state in the exercise of the whole, or entirety of sovereign power, without the aid, approbation, or consent of some of its parts, can be done with such aids, approbation, or consent, from any one of its political, governmental divisions, or parts. In other words, two powerless bodies may create a power. By this governmental, or sovereign legerde-

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main, things that cannot be done at once, and by direct means, may be done piecemeal, and by indirect means.

We hold, that unless the meaning and intention of the constitution is that the legislature have no power to pass any act which authorizes or requires, or which may result in taxation in the least degree, in any part of the state, for works of internal improvement, it might as well have contained no word upon the subject of such works. Taxation is the substance of the prohibition upon the state. It is folly to contend that the substance of this inhibition is the mere name of the tax. Different names possess no charm, when the thing to which they may be, or are applied, is all the while the same to those effected or operated upon by that thing. That no part of the state can, by any means whatever, incur any debt for purposes of internal improvement which involves taxation, is consistent with every provision in the constitution. The only other provisions of the constitution which may be supposed to have even a remote bearing upon the question under consideration, are contained in Article XI. Section one of this article declares that "corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws."

Sec. 3. "It shall be the duty of the legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

From this language, it is certain that cities and incorporated villages are municipal corporations. They are denominated "such municipal corporation." It is not now material to inquire what other political governmental divisions of the state are such corporations. These municipal corporations can only be created "for municipal purposes." The first section of the article now under consideration, gives the power to create such corporations "for municipal purposes." This excludes the power to create them for any other purpose. Should it be said that the power to create municipal corporations is contained in the general grant of legislative

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power, or that it is contained in the third section, which makes it the duty, and confers upon the legislature the power to provide for the organization of cities and incorporated villages," then we reply, the provision that the legislature may create corporations for "municipal purposes," is a restriction upon the power of the legislature, given in general terms. Because, if not intended as a restriction, the language is useless, and means nothing. However, the legislative power is granted to create municipal corporations, we hold that when the same instrument which confers the power to create, also declares for what purposes the same may be created, that they cannot be created for any other purpose. What would be the use of declaring the purposes for which such corporations might be created, if they may also be created for purposes other than those specified? When the purposes are mentioned, the language must limit the power of creation to the purposes specified. Had the intention been to leave the power unconfined, or not to limit, nothing would have been said about the purposes for which the corporations might be created.

Again, is there not a difference between creating a corporation and providing for the organization of such corporation? It would seem so, from the fact (which cannot be successfully confuted,) that the legislature may, by direct language, say that certain persons named, or that certain described territory shall be a body corporate, from and after the taking effect of the act, This would not be an act providing for the organization of a corporate body. The body might never organize. The organization of a body corporate is getting into active form, or business-doing condition, by the election or appointment of officers, agents, &c. This would be an act. The law providing how this should be done, would be a law providing for such organization. The legislative act creating the corporation would be a different law. True, the law creating the corporation, and that providing for its organization, might both be in the same bill, and take effect at the same time. It is equally true, that they might be in different bills, and take effect at different periods of time.

Having come to the conclusion that the legislature have no power under the constitution to create municipal corporations, "except for municipal purposes," we will next consider what is meant by the words, "municipal purposes." That this language is used to designate something else than the ends,

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objects and powers applicable to private corporations, is so obvious as to require no comment.

We understand that "municipal purposes" means the attainment of such local governmental ends, by the execution of local power, as may be necessary for and useful in the protection of the political and civil rights of the individuals composing the local body politic. If this is a correct construction, and if it be also true, that the legislature have no power to create "municipal corporations," except for the attainment of the ends already supposed, then it is clear that the legislature have no power to authorize municipal corporations to create debt or to collect taxes for the construction of works of internal improvement.

But, whatever may be the correct construction or interpretation of the words "for municipal purposes," it is clear that the legislature do not possess this power, if it be true that these words are used to *designate* powers, objects and ends, not applicable to private corporations. Because, being inapplicable to those private corporations, the language is restrictive upon the power, and *requires* that the legislature should create these municipal corporations solely for purposes other than the purposes for which railroad companies and other private corporations are or may be created.

Again, by sec. 3, Art. XI, before recited, the legislature are vested with the express power, and the duty enjoined, to restrict the power of taxation, assessment, borrowing money, contracting debts, and loaning credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

If the legislature are bound to restrict and confine the power of these corporations, so as "to prevent abuses in assessments and taxation, and in contracting debts," it remains to be seen whether, under this legislative power, these corporations may be authorized to levy any amount of taxes, and to contract any amount of debt, regardless of objects or purposes. Is the giving power to do certain things, a restriction upon that power as to those certain things? If so, it would be restricting an incorporated village in the power of taxation by authorizing it to levy an annual tax of eight hundred millions of dollars. But would this be such a restriction as would "prevent an abuse" of taxation? This is the great question. All power to create debts, to levy taxes, to make assessments, &c., must be so restricted as "to prevent abuses" in relation

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thereto, for the reason that the legislature have no power to authorize abuses.

The enumerated subjects for the exercise of municipal power, include everything which can involve taxation by such corporations. So that is clear that abuses in taxation must be prevented, though it be conceded that these corporations may be authorized to levy taxes for purposes other than those for which they may be created. Is it, or is it not, an abuse of taxation to tax the people of the town of Beloit two hundred and forty thousand dollars in twenty years, in addition to their proportion of state, county, and all town taxes for the support of the poor and town government? Or is the town of Beloit without the spirit of these provisions in relation to municipal corporations? If so, how stands the city of Beloit, within the town, and which was a village at the time of the passage of the act in question? If this city cannot now be compelled to pay these taxes because it involves an abuse of taxation, how could the town and village be compelled to do so? Can towns be authorized to create debts, and enforce taxation for railroad purposes, or for purposes other than those for which they were and may be created? Is our constitution thus partial and discriminative in favor of villages and cities, and against towns? Is an abuse of taxation a question of fact, of law, or compounded of law and fact, or a question, be its nature what it may, to be determined by the legislature? If to be determined by the legislature, is that determination final, exclusive and non-reviewable in the courts of the state? This cannot be, because the legislature is not the sole and exclusive judge of the measure of its power in this particular. To hold that it is such sole, exclusive judge, is to hold that it may authorize abuse in taxation; or that there cannot be any such thing as an abuse of this kind. The result of this inevitably is, that this language of the constitution means nothing. Because, with this language in the constitution, the power is the same as it would be were the language out of it. It is the business and duty of this court to construe and determine what the language in the constitution means. The court must therefore construe this language and pronounce its meaning. When the precise meaning is declared, it will be easy to determine whether there is an abuse in taxation, in any case that is presented, when there is no dispute as to the facts, or where the facts have been found by a court or jury. The question is therefore a judicial one, and not legislative.

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In this case there is no dispute about the facts; and if there is not an abuse in taxation presented in the matter of amount alone, it will be somewhat difficult to state the amount that will present a case of such abuse. But independent of the question of amount, there is a direct abuse in the creation of a debt and imposing taxes, for purposes other than those for which municipal corporations may be created.

All the power of municipal corporations, in relation to taxation, assessment, borrowing money, contracting debts, and loaning their credit, when exercised, must be confined to the purposes for which they may be created; and for no other purpose can any of these powers be exercised. And as to matters where these powers may be exercised, the powers must be restricted to such an extent, that there shall be no abuse in taxes. This third section in words only applies to "such municipal corporations" as are "incorporated villages and cities." If the spirit of this section does not include towns and counties, then it remains to be seen whether they can by any possibility be authorized to contract debts and enforce taxation to any extent, and for any purpose, without regard to the objects of their creation.

This presents two considerations: 1. Are towns and counties municipal corporations? 2. If they are such corporations, can the legislature authorize them to do any act foreign to or without the purposes for which they may be created?

As to the first proposition, we contend that towns and counties are municipal corporations. This court has decided that the taking of private property for a common highway, was not taking it for municipal purposes, which required the verdict of a jury, establishing the necessity of so doing before it could be done, within section 13, Art. I, of the constitution. It is obvious that this decision is correct, because a highway is for all the people of the state; and property taken therefor is taken for the use of the whole public. This being so, it cannot in any just sense be said that the property is taken for municipal purposes. This is not a decision determining what is and what is not a municipal corporation. This last was not necessary to a decision of the points raised in the case referred to. Burrill, in his Dictionary, defines a municipal corporation to be "a public corporation; a corporation created by government for political purposes, and having subordinate legislative powers, to be exercised for local purposes, such as a county, city, town, or village." Much the same

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definition is given in 2 Kent's Commentaries, 275. Burrill, in defining the word "municipal," says, "belonging to a city, town, or place, having the right of local government; belonging to or affecting a particular state, or separate community; local; particular; independent." Nothing different is gleaned from Wilcox on Municipal Corporations. This author, speaking of these corporations in ancient times, page 10, Law Library, vol. 12, says: "The purposes, then, of municipal corporations, were the security of commercial associations, and the investing of the inhabitants with the power of governing themselves."

It is submitted, that no author or court has ever gone so far as to assert that "municipal purposes" can be construed to mean being a stockholder or member of any railroad company, or an aider in the construction of a railroad. If anything can be considered as settled law, it is the proposition that towns and counties are municipal corporations. These, by our constitution, can only be created for municipal purposes; that is, local government power; or, as we have before said, for the attainment of such governmental ends, by the execution of local power, as may be necessary for, and useful in the protection of the political and civil rights of the individuals composing the local body politic. It would be passing strange if it was intended by our constitution that the legislature should have power to confer upon these local governments, towns and counties, powers which were, by the same instrument, expressly prohibited to, or taken from the state, simply because the legislature are authorized to create the local public corporations, for purely municipal purposes. This cannot be maintained, as the state cannot engage in the construction of railroads, so towns and counties cannot. Such engagements, as we have already seen, are not municipal purposes, so that on that score, towns and counties cannot exercise the power to construct or aid in the construction of such works.

As to the second proposition, namely, whether the legislature can authorize municipal corporations to do any act foreign to or without the purposes for which they may be created, it will not be necessary to spend much time. It is quite obvious, that when a corporation can only be created for certain enumerated purposes, that its whole power must remain confined to the objects of its creation. To hold otherwise, is to maintain that a body may exercise a power wholly without

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and contrary to the law of its being or creation. This would be flat absurdity. It may be proper to remark, that the framers of the constitution very likely confined their language, for the restricting the power of taxation, &c., to two species of municipal corporations, villages and cities, for the reason that they well know that these bodies in other states had been much in the habit of contracting heavy debts for purely municipal purposes, in consequence of which, many abuses in taxation had been committed. This was out of more abundant caution as to these bodies. We admit, that while keeping within these limits, abuses in taxation might be great. This being foreseen, the third section was inserted, requiring such restriction in the exercise of municipal powers, for municipal purposes, as would prevent abuses in taxation. Nothing in support of the act in question is to be obtained from this article of our constitution on corporations, nor from any other portion of the instrument.

It has been argued for the plaintiff, that if towns and counties cannot be authorized to become stockholders in railroad companies, and to obtain the money to pay for stock thus subscribed, that individual citizens of a state cannot be incorporated into a railway or canal company. If this were admitted, it would not affect the proposition that towns and counties cannot be incorporated into such companies. But the argument is not sound, for the reason that the legislature, by section one of Article XI. of the constitution, are expressly authorized to incorporate railroad companies. We maintain, however, that this power must be so exercised that no power to enforce taxation is given, or so that no taxation shall result from any thing done by such company, or by any stockholder, or member thereof. The legislature may authorize the construction of any number of railroads or canals that it may think ought to be constructed; but these must all be constructed without taxation. And the legislature must so exercise their powers in regard to corporations for the construction of works of internal improvement as to avoid the imposition of taxes therefor.

When these works can be constructed without resort to taxation, there is no objection to be urged. But the constitution protects every person from the payment of taxes for such purposes. No person is required to yield obedience to any enactment which declares that he shall pay taxes, or money, for such purposes, or that he shall be a member of a cor-

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poration created for the construction of such works, or that he shall assist in the construction of a railroad or canal. It is not necessary for the legislature to pass an act to enable or authorize an individual to become a member or stockholder in a railway company. He can do this of his own, and not of legislative will. Not so with a town, county, or state. Here positive enactment is necessary. So that the difference between incorporating individuals, and towns, and counties, into a railway corporation, is remarkably plain. To hold that the legislature can incorporate the towns, villages, cities, and counties of the state into a railway corporation, and empower them to obtain the money to construct railways by taxation, when the state is prohibited from engaging in such works, is to maintain an absurdity. If towns and counties cannot be incorporated into railway companies, how can any of them be authorized to become member or stockholders of such companies? Are not these companies made up of stockholders? And can there be such company without stockholders? It seemeth not.

On the second proposition the act in question must then be pronounced unconstitutional and void. In no point of view can this enactment be sustained without violating the spirit of at least two provisions of the constitution. The bond in question is of consequence void, and the plaintiff must fail in his action, and the judgment of the circuit court should be reversed.

M. H. Carpenter, for the respondent.

By the Court, Cole, J. This action was brought to recover interest on coupons attached to town bonds issued by the appellant in 1853, for the purpose of aiding the construction of the Racine and Mississippi railroad. The bonds were issued under an act of the legislature, authorizing the board of supervisors of the town, to subscribe one hundred thousand dollars to the capital stock of a railroad company, authorized to construct a railroad from the city of Racine to the village of Beloit, and to pay for such subscription in the bonds of the town, payable in twenty years, with inter-

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est payable annually, in the city of New York, not exceeding seven per cent. per annum. The law provided that no bonds should be issued until a majority of the legal voters of the towns, voting upon the question, should vote in favor of the subscription, at a special election, called and held for that purpose. From the record it appears that an election was held, and that three hundred and twenty-one ballots, out of three hundred and eighty-eight cast upon the question, were in favor of the subscription. The supervisors issued the bonds, and delivered them to the company, receiving therefor, an equal amount of the capital stock of the company. The bonds, by their terms, were made transferrable by general or special endorsement, or by delivery, the same as a note of hand, payable to bearer. The respondent bought the bonds and coupons sued upon, for value, and without any actual notice of any of the matters of defense set up by the town in its answer. The payment of the interest due upon these bonds is now resisted by the town on various grounds.

But the fundamental question raised and discussed in the case, is in regard to the power of the town to subscribe for stock in, and to loan their credit to railroad companies, even when authorized by an act of the legislature so to do. Unless expressly authorized by the legislature to make the subscription, it is not contended that any could have been made in behalf of the town. But having been authorized by an act of the legislature, it must be admitted, that upon the authorities, the subscription made in conformity to the provisions of the act is valid, unless the law is unconstitutional. It is true, some objections were taken to this legislation, based upon general principles of law and sound policy, aside from the prohibitions of our constitution. It is said to be entirely foreign to the object and purpose of a town or municipal corporation to subscribe stock to aid in constructing railroads, or to carry on works of internal improvement of this

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nature. And it is insisted, not without force of reasoning, that town and municipal corporations exist, or are created for no such purpose, and that it is an entire perversion of the powers of such corporations to permit them to do so. But this field of discussion has frequently been gone over in the adjudged cases, and the whole argument has been thoroughly exhausted. In most of the cases found in the reports of the different states of the Union, laws authorizing towns, cities, and villages to subscribe stock for railroad companies, and incur indebtedness for making certain internal improvements, have been sustained, and declared valid, unless they were in conflict with some provision of the state constitution. The cases upon this subject will be found, most of them, in the notes to pages 108 to 125, inclusive, of Pierce on American Railroad Law.

The precedents for this kind of legislation are so numerous; the sanction which it has received from the executive, legislative, and judicial departments of the government, in other states, is so uniform; the rights and interests vested on the faith of it, are so important, when considered in connection with the fact that the laws were to have no effect, unless with the assent of the people directly affected by them; and after the subject was fully discussed by the press, and in public meetings, the people directly interested, voted in favor of these subscriptions, thereby authorizing their corporate authorities to make them; and also when it is borne in mind, that great amounts of capital have been invested in the bonds of towns, counties, and cities, thus issued, by innocent *bona fide* holders; when all these considerations are regarded, it seems rather late to raise the objection that this policy has been all wrong from the beginning; that the legislation, by which the present condition of things has been brought about, is not wise and wholesome, but evil and pernicious, and must now be repudiated altogether.

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As a matter of course, if this species of legislation is forbidden by the constitution, or comes fairly within the intent and meaning of any of its prohibitions, it must fall whatever may be the consequences to the honor and character of our people, or however great may be the loss to those whose means have been honestly invested in this class of securities.

But, unless the constitution does restrain the legislature from conferring upon towns, counties and cities the authority to make subscriptions to the capital stock of companies incorporated to construct rail roads, in which they are interested, it is the plain manifest duty of the courts to sanction this kind of legislation. Considerations in respect to its wisdom and sound policy must be addressed to another forum. These general observations were deemed not inappropriate as an answer to some remarks made by counsel in the argument of the present case, and that of *Clark et al. vs. The City of Janesville*, which involves substantially the same questions under the constitution.

I will now proceed to notice the various provisions of the constitution which are relied upon to show that all acts of the legislature authorizing towns, counties and cities to subscribe to the capital stock of railroad companies, and issue bonds for such subscriptions, are unconstitutional and void. The two following provisions may be conveniently considered together.

Section 3 of Art. VIII. reads as follows: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation." And, section 10 of the same article: "The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works." It is difficult to perceive how these provisions can fairly be said to apply to anything but the state in its political capacity as such. The whole article appears to be

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designed to regulate the finances of the state proper. This is the fair reasonable and consistent construction to be placed upon its provisions. If it was intended to regulate the finances of the towns, counties and cities, and to restrain them from loaning their credit in aid of any corporation, or to inhibit them from contracting debts for works of internal improvement, or from being a party to carrying them on, the language was most unfortunately chosen to convey that intention. The leading idea is, and this corresponds precisely to the fact, that the state, as a body politic or political organization, independent of and distinct from its constituent parts, would have its treasury, its money, its credit and its debts; and that the power of the legislature over these things, which would otherwise have been unlimited, should be restricted and exercised in a certain manner. Hence, in the second section it says, "no money shall be paid out of the treasury, except in pursuance of an appropriation by law." To what does this refer? What does it mean? Does it mean that no money shall be paid out of the treasuries of the different towns, counties and cities in the state without an appropriation made by the legislature? This construction is too absurd to be seriously insisted upon. And yet, if the 3d and 4th and 10th sections of this article, which speak of "*the state*," "the credit of the state," the "public debt of the state," and that "the state shall not contract a debt for works of internal improvement," if these sections can be held to apply to towns, counties and cities, why may it not be claimed with equal reason that the other sections of the article apply to the towns, counties and cities as well as the state?

The town of Beloit, or the city of Janesville, might give or loan its credit in aid of a corporation, without the credit of the state becoming pledged in any way thereby. Such indebtedness would be the indebtedness of the town or the city, not the indebtedness of the state. It might with the

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same propriety be said that the indebtedness of the state of Wisconsin was the indebtedness of the United States, as to say that the indebtedness of the town of Beloit is the indebtedness of the state of Wisconsin. Why then is it claimed that because the constitution forbids that the credit of the state shall be given or loaned in aid of any corporation, that by the force of this language the town of Beloit is forbidden to loan its credit in aid of any corporation? Such construction is doing violence to all language and all known rules of interpretation. And, to my mind, it is equally clear that though the state, in its political capacity as such, is prohibited from contracting any debt for works of internal improvement, and from becoming a party to carrying them on; yet, this prohibition does not apply to the political subdivisions of the state, the towns, counties and cities, which, when properly authorized, may contract such indebtedness and become a party to such improvements. At all events, the natural and rational construction of these restrictive clauses is that they apply to the state in contradistinction to the subdivisions of the state. Otherwise, how would it be possible for our cities and villages to improve their harbors; to pave and grade their streets; to build their bridges; or to do many other things calculated to increase their trade and property, and promote the comfort and welfare of the citizens? This construction derives additional force from a reference to the mischiefs and evils which these prohibitions in the constitution were intended to guard against and prevent. It is well known to every person of common information in respect to the history of this country that at the time our constitution was adopted many of the neighboring states had become almost hopelessly involved in debt, by attempting to carry forward and sustain a general system of internal improvements. The credit of some of the states was ruined, and public confidence in all greatly impaired.

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It was notorious that these works always cost the state more than they did individuals and private corporations, and were operated at much greater expense. Besides, no system could be devised which would operate alike over the whole state. If the money to carry on internal improvements was raised by general taxation, and there was no other way to raise it, the burdens would fall upon all, while the benefits would enure to a comparatively small portion of the state. And to save the state from the bankruptcy and ruin which had followed in other states in consequence of their embarking in a general system of internal improvements, and to avoid the unequal taxation inseparable from that policy, the framers of the constitution wisely provided that the state should neither loan its credit to any corporation or be a party to carrying on such works. It was thought best to leave their construction to private enterprise and associated capital, rather than that the state should have anything to do with them. It was not supposed that towns and counties whose inhabitants were mostly farmers, or that even cities would involve themselves in debt for these works. Probably, if the country had then had the experience of the last ten years, and seen the distress and financial ruin which towns, counties and cities have brought upon themselves by subscribing to the capital stock of rail road companies, and issuing their bonds therefor, a provision would have been incorporated in the constitution to prevent the evil. But this was not done; and we cannot construe the constitution as though such a prohibition was there. The prohibitions therein incorporated apply to the state, but do not reach subscriptions of the character in question. See *Cass vs. Dillon*, 2 Ohio St., 607.

But it was further contended, in behalf of the town, that if the state itself was prohibited from loaning its credit in aid of a corporation, or from building railroads, or of becoming

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a party thereto, that it cannot authorize a town or city to do so. The argument in brief is, that a state cannot authorize one of its political divisions to do what it cannot itself do. A slight examination will show that this position is unsound.

We suppose it to be a well settled political principle that the constitution of the state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature, and that it is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States. The legislature, subject to a qualified veto of the executive, possesses all the legislative power of the state. If there is nothing in the constitution forbidding it, why was it not competent for the legislature to authorize towns and municipal corporations to subscribe stock for rail roads. But a sufficient answer was given to this argument by the counsel who sustain the validity of these bonds, by saying that if the proposition was sound that the state could not authorize a municipal corporation or town to do what itself could not do, that the argument proved too much, and therefore must be rejected. It would go to the extent of denying that the legislature could create corporations to build rail roads, plank roads, gas works, and for doing many other things which the state cannot do. These corporations have been created since the organization of the state government; various works of internal improvement have been carried on by them; they have exercised the right of eminent domain in the prosecution of their enterprises, and the constitutionality of this legislation has not been questioned.

It is very true that in some of the cases sustaining the constitutionality of laws authorizing towns and municipal corporations to subscribe for stock to rail road companies, it is

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said that as the state could carry on these works, or aid in carrying them on, therefore it could authorize the local authorities to do what it refuses to do itself. *Clark vs. The City of Rochester*, 24 Barb., 447; *Sharpless vs. The Mayor o Philadelphia*, 21 Penn. St., 147. But it seems to me that the true reason is that when the legislature is authorized to create municipal corporations, and no limit is imposed by the constitution as to the power which shall be conferred upon them, that then the extent of such powers rests in the discretion of the legislature. Of course the legislature could not authorize any corporation to violate directly or indirectly any provision of the constitution. But when the constitution does not prohibit the legislature from conferring the power upon cities and towns to take stock in railroad companies, or to loan their credit in aid of such works, I cannot understand why that power may not be granted to them as well as many others which they exercise. The state could not construct water works for, or pave and grade the streets in the city of Janesville; but does any one doubt that the legislature might authorize the corporate authorities to contract a debt for making these improvements? *The City of Aurora vs. West*, 9 Ia., 74.

Another objection taken to the constitutionality of this legislation may be disposed of in this connection. It is said that subscribing stock and issuing bonds for building railroads, is no legitimate part of the authority of a city or a town, and certainly foreign to the purpose for which they are created. Sections 1 and 3, of article IX, are relied upon to sustain this position. It is evident that section one was intended to regulate the manner in which corporations should be created by the legislature. It provides that "corporations, without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment

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of the legislature, the object of the corporation cannot be attained under general laws." But this section does not limit the power which the legislature may confer upon a corporation. It declares that they shall be created only by general laws, except when it is a municipal corporation; then it may be created by special act. The plain, obvious intent of the section is, to prevent the evils and mischiefs of special legislation; and its object was not to restrict the legislature from conferring plenary powers upon municipal corporations.

It was further objected, that towns, cities and counties are organized and created strictly for governmental or police purposes, and that the building of railroads, and embarking in a system of internal improvements, on account of some benefits which may accrue from such works, to the citizens, is foreign to the objects, and a perversion of the powers of these corporations. I have already alluded to this objection, and I do not propose to discuss the proposition more. That it is competent for the legislature, in the absence of constitutional restrictions, to confer upon towns and cities the power to subscribe stock for railroads, has been generally affirmed by the courts where the question has arisen. I could add nothing to the reasoning of these cases, were I to enter upon the discussion of the question involved. The subject is very ably discussed in the decisions to which I have referred, and I am content to rest the question upon those authorities, providing our constitution does not render them inapplicable.

I cannot perceive that section 3, of article XI, can possibly have any application to this case. That section makes it the duty of the legislature "to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses" of the same. The town of Beloit is not one of those corporations embraced within this section, as in effect, was decided in the case of

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Peck vs. Norton, 3 Wis., 714. Were this otherwise, and could it be assumed that the appellant fairly came within this provision of the constitution, the section itself would furnish the strongest argument which could be adduced, in favor of the validity of the bond, since it is a clear recognition that the corporations therein named may be clothed with this power to "borrow money," "contract debts," and "loan their credit." And for what purpose do these corporations borrow money, and loan their credit? Not certainly to defray the ordinary expenses of the local government. It is only to enable them to engage in such public improvements as are deemed necessary to develop the resources of the tributary country, and increase the business, commerce and traffic of the respective localities. And the simple fact, that it was made the duty of the legislature to restrict the power of corporations in loaning their credit and borrowing money, is the strongest implication that such a power was supposed to exist, and that it would require regulation; for certainly it would not be pretended that the legislature could restrict the exercise of a power which did not exist. But it is unnecessary to dwell upon this clause of the constitution. It in express language applies only to cities and incorporated villages; and therefore the town of Beloit cannot be considered within it.

There remains to be noticed one or two clauses of article VIII, which, it is claimed, have some bearing upon the law in question. And I will merely say, in reference to the 4th and 8th clauses of that article, that like the 3d and 10th, they appear to me to relate to the state, and to a state indebtedness, or to a law directly imposing a tax, and not to one authorizing a town to subscribe stock, if the people of such town shall vote to do so. The remarks which have already been made upon the other clauses of that article, apply to the ones now being considered. This law authorizing the super-

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visors of the town of Beloit to make the subscription, providing a majority of the people should vote in favor of it, did not create a state indebtedness, or impose such a tax as was contemplated by the eighth clause of this article. And the conclusion at which I have arrived upon the subject is, that the constitution of this state neither expressly, nor by any fair implication, prohibits the legislature from granting the power to towns and municipal corporations to subscribe stock for the construction of railroads in which they are interested, and to issue bonds therefor.

A few subordinate points remain to be noticed. It was objected that the railroad company had no power to exchange its stock for bonds of the town of Beloit. But the act authorizing the town to subscribe the stock, was a sufficient authority to the company to receive the subscription. What legislation was necessary to authorize the company to receive a subscription, which the town has ample power to make?

Again, it was objected, that the supervisors had no authority to make the subscription, and issue the bonds, on account of some alleged omission to comply with the provisions of chapter 12, Pr. Laws, 1853, in giving notice of the election, and canvassing the votes, &c. I am unable to discover any defect in the notice, or any such irregularity in conducting the election, or ascertaining the result, as should in any wise affect the validity of the bonds in the hands of the respondent. Indeed, the election appears to have been legally conducted; and the circumstance that the inspectors, when they canvassed the votes, stated the result in figures, instead of writing the numbers out in full, ought not to affect the validity of these securities. If irregularities in the election in fact existed, or if the notice was defective, the case of *The Commissioners of Knox County, Indiana, vs. Aspinwall et al.*, 21 How., U. S. R., 539, is an authority in point to show that such matters would not constitute a good defence in this action.

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It was further objected, that the authorities of the town had no power, under the act of the legislature, to make the bonds negotiable, like commercial paper. But the authority to issue the bonds carried with it the incidental power to issue them in that form, and to give them that character usually belonging to this class of securities. Such securities are ordinarily transferable, and are more readily disposed of in market on that account. I think the supervisors had ample power to issue the bonds in the manner they did.

Upon the finding of the circuit court, I have no doubt but the judgment of that court is right, and must be affirmed.

ROCK RIVER BANK *vs.* SHERWOOD.

APPEAL FROM CIRCUIT COURT, ROCK COUNTY.

Heard October 19, 1859.] [Decided January 4, 1860.

Banks—Interest—Usury—Corporation—Contracts—Pleadings.

Where S. had overdrawn his account with a bank, and then made a note to the bank putting into it the amount of interest then due at 10 per cent., and making the note draw interest at 12 per cent. when due: Held, that such contract was not void by reason of the banking law of Wisconsin, which authorized the bank to receive a rate of interest not exceeding 10 per cent.

The banking law of Wisconsin provides no penalty or forfeiture in case a bank takes more than 10 per cent. interest.

A corporation is not only incapable of making contracts which are forbidden by its charter, but in general, it can make none which are not necessary either directly or indirectly, to effect the objects of its creation.

When a corporation undertakes to make a contract entirely foreign to the purposes and objects of its creation, such contracts are void.

The case of *Madison, &c., Plank Road Co. vs. Watertown, &c., Plank Road Co.*, 7 Wis., 59, considered and approved.

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There being no penalty provided in the general banking law for a violation of the same by a bank in taking more than 10 per cent. interest, the general law relating to usury applies to, and has the same effect upon a contract made in violation of the charter by the bank, as upon a contract made by an individual.

When a bank reserves a greater rate of interest than its charter allows, the general usury laws apply to the contract, although it does not exceed the rate prescribed by such usury law; and the general law is modified by a restriction in the bank charter, to the extent of the restriction.

Under the first section of the usury statute of 1856, the security was valid for the repayment of the principal sum loaned, but void for the interest reserved.

A pleading which avers that a bank had no authority to take a note which reserves a greater rate of interest than the bank is authorized to take, does not raise the question of usury, but of capacity in the bank to make the contract.

The interest on a usurious contract may be recovered, unless the defendant by his pleadings set up the usury as a defense, and apply to the court for the relief given by the usury act, and make and prove the tender of the principal as required by the statute.

This was an action brought by the Rock River Bank to recover the amount of a note made by M. W. Sherwood. The complaint alleged that on the 1st day of January, 1858, Sherwood, for value received, made, executed and delivered to Jackson J. Bushnell, the promissory note, and thereby promised to pay to the order of Bushnell, at the Rock River Bank, the sum of two hundred dollars in forty days from the date, with 12 per cent. interest, after due; and that the note was owned by the bank, &c.

The answer admitted the making and delivery of the note, and averred that the indebtedness was owing to the bank as a banking corporation, organized under the general banking laws of the state, for over drafts drawn by the defendant after the 16th day of May, and before the 4th of August, upon the upon the bank as a banking corporation. That at the date of the note Bushnell, as the agent of the bank, requested him to make this note in full for these over drafts, which amounted to $183 14, on which interest was computed at 10 per cent., amounting to $16 86. That at the time of making the over drafts and the taking the note, the bank was a banking corporation, &c., and that by the laws it had no authority or power to take the note, nor enter into the contract, and asked that the note be declared void, &c. To this answer the bank demurred generally.

The cause was tried at the circuit by the court, who found the issue of law for the bank, and that the bank was entitled

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to the principal, and 10 per cent. from the time the note became due, amounting to $208 25. On which finding judgment was entered; and Sherwood appealed to this court.

The following are the exceptions to the finding of the referee and to the judgment thereon: 1. The note in question was given for a discount, or for money loaned by the plaintiff to defendant, the note being the security therefor, and drawing interest after due at 12 per cent., was void, the plaintiff being a banking corporation. 2. The finding and judgment is erroneous, it being for 10 per cent., the contract being for 12 per cent. The judgment should have been 7 or 12 per cent., if for anything. 3. The finding is contrary to law.

Todd & Rockwell, for the appellant.

The note was taken by the bank for money loaned, and the agreement was to pay more than 10 per cent. It was a reloaning of $183 14 for forty days with interest then due added, but was only a delivery of money by the bank to Sherwood.

It was an agreement to pay more than 10 per cent., and the contract was an entirety, and both parties would be bound by it, except for the inhibition in the bank's charter, would be binding on both parties; and the complaint claims judgment on the contract, and not on a different one. And this contract could be enforced as sood as it became due.

But the general banking law, which is the charter of this bank, inhibited the taking of this note, § 4, R. S., 461: *Heal & Armory vs. The Providence Insurance Co.*, 2 Cranch, 127; *N. Y. Insurance Co. vs. Ely*, 5 Conn., 568; *Bank of Chilicothe vs. Swayne, et al.*, 8 Ohio, 257; *Bank of U. S. vs. Owens et al.*, 2 Pet., 527; *Tallman vs. Truesdell, et al.*, 3 Wis., 453; *People vs. Utica Ins. Co.*, 15 J. R., 358; *New Fire Ins. Co. vs. Sturges*, 2 Cow., 644; *Same vs. Ely*, id., 678; *Beach vs. Fulton Bank*, 3 Wend., 482; *Life & Fire Ins. Co., vs. Mich. Fire Ins. Co.*, 7 id., 31; *Creed vs. Commercial Bank*, 11 Ohio, 487; 12 id., 564; Angell & Ames on Corp., 233; 13 Conn. R., 249; 4 Peters, 168; 2 Doug., 230; 1 Day, 401.

The agreement to pay 12 per cent., is not in the nature of a penalty, and cannot be so treated, but it is as it purports, a usurious agreement. The judgment is erroneous in being for 10 per cent. interest, and, for that reason alone, must be reversed.

Mat H. Carpenter, for the respondent.

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The recovery should have been for 12 per cent. instead of 10; but of this the appellant cannot complain.

This was not a case in which the bank was restricted to 10 per cent. It was neither "a loan on real or personal security," nor a "discount of notes, bills or other securities." The note was given on a settlement between the parties, and as a payment to the bank of a *bona fide* indebtedness.

This note drew no interest at all till after its maturity; and if it had been then paid, he would have paid only the 10 per cent. included in the note. The provision to pay 12 per cent. is in the nature of a penalty, and does not violate the banking law. *Roberts vs. Tremayne*, Cro. Jac., 509; *Hayer vs. Cooper*, 1 Cowp., 112; *Grover vs. Graves*, 1 Wash., 1; *Winslow vs. Dawson*, id., 118; *Cutler vs. How*, 8 Mass., 257; *Long vs. Storie*, 10 E. L. & Eq., 182; 2 Pars. on Cont., 393–4, and cases cited in notes to section 4, chap. 9, pt. 2; *Fisher vs. Otis*, 3 Chand., 83; *Lloyd vs. Scott*, 4 Pet., 225; *Shuck vs. Wright*, 1 Iowa, 128.

The note is not void, even if the court considers the banking law violated by receiving it. The general usury act, chap. 55, 1856, attaches to it. *Phil. Loan Co. vs. Tousier*, 13 Conn., 249; *Planter's Bank vs. Sharp*, 4 S. & M., 75; *Grand Gulf Bank vs. Archer*, 8 id., 151.

By the Court, Cole, J. We should probably be refining too much upon the real nature of the transaction mentioned in the pleadings in this case, were we to hold that the note in question, was not in fact given by the appellant for a loan of money by the bank to him. It appears from the facts in the case, that Sherwood had been doing business with the bank, and had overdrawn his account, and that upon a settlement between him and the bank, he gave his note for such indebtedness, which note was made payable forty-five days from date with interest at the rate of 12 per cent. per annum after due. The bank upon this settlement charged the usual rate of interest on the amount advanced upon the checks of the appellant, and undoubtedly regarded it as an ordinary loan to one of its customers, who had overdrawn his account. At

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all events, we are disposed so to consider it; and in that light, shall examine the legal consequences flowing from the transaction.

And the first question presented is, as to the power of the bank to make this contract. It is insisted by the counsel for the appellant, that as this contract was made by a bank which, by the laws of this state, was only authorized to demand and receive a rate of interest not exceeding 10 per cent. upon any loan made by it, that therefore the contract was void for want of capacity in the bank to make it. This objection renders it necessary to refer to the power granted to banks organized under chapter 71, R. S., 1859, the general banking law of the state. The first three sections of that act refer more particularly to the steps to be taken and the manner of organizing a bank. Section 4 of the chapter provides that "such association shall have power to carry on the business of banking by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange; by loaning money on real and personal securities; and by exercising such incidental powers as may be necessary to carry on such business." Section 8 declares that it shall be lawful for such association to purchase, hold and convey real estate, for certain purposes therein specified, and contains an absolute prohibition upon the association from purchasing, holding or conveying real estate in any other case, or for any other purpose whatever. By section 15 it is provided, that "such banks or banking associations may demand and receive for loans on real and personal securities, or for notes, bills, or other evidences of debt discounted, a rate of interest not exceeding 10 per cent. per annum until the 1st day of January, one thousand eight hundred and sixty;" but no penalty or forfeiture is provided or declared in the law in case a bank takes more than 10 per cent. interest.

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It is believed that the above are all the provisions of the banking law having a direct bearing upon the point under examination. In order to have the whole question before us, it may be as well to refer in this place to the general statute upon the subject of usury. Sections 1 and 2 of chapter 55, Sess. Laws, 1856, read as follows:

Section 1. All bonds, bills, notes, assurances, conveyances and all other contracts or securities, whatever, whereby there is reserved or secured a rate of interest exceeding 12 per cent., shall be valid and effectual to secure the repayment of the principal sum loaned, but no interest shall be recovered on such securities, or on any money or other thing loaned by such contract.

Section 2. Whenever any person shall apply to any court of this state to be relieved in case of a usurious contract or security, or when any person shall set up the plea of usury in any action or suit instituted against him, such person to be entitled to such relief or the benefit of such plea, shall prove a tender of the principal sum of money or thing loaned to the party entitled to receive the same."

It is at once apparent that the bank reserved upon this note a greater rate of interest than it was authorized to receive for any loan, by the banking law, though it did not exceed the rate which a person is permitted to reserve by special contract, under the general usury law. And the question arises, is the note void for the reason assigned, that the bank had no power to make such a contract?

Angell and Ames, in their work upon corporations, 270, § 256, in discussing the question as to what contracts in general, incorporated companies may make, say: "And here we would observe, that a corporation and individual stand upon very different footing. The latter existing for the general good of society, may do all acts, and make all contracts which are not, in the eye of the law, inconsistent with

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this great purpose of his creation; whereas, the former having been created for a specific purpose, not only can make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or indirectly, to enable it to answer that purpose." *The Penn. Del. and Md. Steam Navigation Company vs. Dandridge*, 8 Gill and J., 248.

And it is a familiar principle which runs through all the law upon this subject, that a corporation is not only incapable of making contracts which are forbidden by its charter, but in general it can make none which are not necessary either directly or indirectly to effect the objects of its creation. So, when a corporation undertakes to make a contract entirely foreign to the purpose and objects of its creation, such contracts are void. Illustrations of this rule are abundant. In the recent case of the *Madison, &c., Plank Road Co. vs. Watertown, &c., Plank Road Co.*, 7 Wis., 59, where the former company, which was authorized by its charter to construct a road from Milwaukee to Madison; and after having constructed the same to Watertown, determined to leave the field west of that place, temporarily to the other company, which had a charter for building a road westwardly along the route, nearly identically with that through which the complainants were authorized to extend their road; and the complainants signed a guaranty for the purpose of enabling the defendants to borrow money with which to construct a road westwardly, &c.; this court held the contract of guaranty void, as being entirely foreign to the object of the corporation, and without the general scope of its authority.

So an insurance company, which by its act of incorporation, was authorized to insure buildings and personal property against fire, and to make all kinds of marine insurance, and

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to loan money on bottomry, *respondentia*, or mortgage of real estate, or chattels real, with a restriction that it should not exercise banking powers, loaned money on a promissory note, and indorsed the same; it was held that the act was unauthorized, and impliedly forbidden by its charter. *The New York Firemen's Insurance Company vs. Ely*, 2 Cow., 678; and cases cited in the notes to Angell & Ames on Corp., on pages 272 to 276 inclusive.

These examples are quite sufficient to illustrate the rule, and show the application of the doctrine in a case where a corporation attempts to make a contract entirely foreign to the purpose and object of its creation, and beyond the scope of the authority granted in its charter. Does the present case fall within that class of decisions? Here the bank, it is conceded, had full and ample power to discount promissory notes, loan money, &c., and conduct a general banking business, but it could only reserve ten per cent. interest upon its loans. It is not a case where a corporation usurps a power not given by its charter, but where, in the exercise of a lawful power and in conducting its legitimate business, it has exceeded the limits fixed by law. Had the note been given, drawing ten per cent. interest, after it became due, there could have been no question as to the validity of the contract. But the objection is, that the bank had no authority to discount a note at a greater rate of interest than the general banking law allowed; and if it does, the note is void for want of such power. Is this objection sound? I think not. And yet it must be admitted that there are a number of cases which appear to sustain this position. *The Bank of the United States vs. Owens*, 2 Peters, 527; *Bank of Chilicothe vs. Swayne*, 8 Ohio, 252; *Creed vs. The Commercial Bank of Cincinnati*, 11 id., 489; *Spaulding vs. The Bank of Muskingum*, 12 id., 544; *Orr vs. Lacey*, 2 Doug., 230, are cases where this question as to the effect of a bank discounting a note at a greater rate of

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interest than is allowed by its charter is discussed; and some of them hold distinctly that the contract is void, for want of capacity in the bank to make it.

I am not prepared to follow these decisions. In my judgment the reasoning of these cases is clearly, successfully, and completely answered by the opinions given in the *Commercial Bank of Manchester vs. Nolan et al.*, 7 How. Miss., 508; and *McLean, Assignee, &c., of Manard vs. The Lafayette Bank et al.*, 3 McLean, 587. Mr. Justice Clayton gave an exceedingly able and elaborate opinion in the first case, in which the case in 2 Pet. is carefully examined and reviewed; while the doctrine of the Ohio cases is vigorously assailed, and to my mind completely overthrown. In the case in the 3d McLean, Mr. Justice McLean in considering the effect upon the contract of a bank taking usury, and meeting the objection that such a contract was void for want of power of the bank to make it, uses the following language, p. 611: "Now here is a capacity imparted to do every thing which a natural person could do in relation to the business specified. The natural persons who compose the corporation, are authorized to do, in their aggregate capacity, what each one might do in his natural capacity. Now what is the difference between the natural and artificial capacities here spoken of? It is admitted that an artificial person has no power to violate the law of its creation, or any other law. Has a natural person power to violate the law? We suppose not, and in this respect no difference is perceived between the two capacities. It is not a question of capacity, but of prohibition. A natural person is prohibited from taking more than *six per centum per annum* interest. If it were not for the prohibition he might agree for any reasonable rate of interest. And if the bank had not been prohibited in like manner, might it not have charged in the same way? Is there any doubt of this? It has power to loan money on interest, and no rate of inter-

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est being established by law, may it not contract for the rate of interest as a natural person? If it may not do this, it may do nothing, the prohibition in the charter acts upon the artificial capacity, as the general law of the same import acts upon the natural capacity of every citizen."

Again he says, while endeavoring to show that a bank and an individual occupy the same ground as to taking usury: "Neither can have any implied power to make a contract in violation of law; and the argument that a bank can do nothing for the doing of which power is not given, while an individual may do any thing which is not prohibited, is without force, because it can have no application to the case. The act is prohibited alike to the bank and the individual. On what principle, then, can the distinction be sustained? As has been shown, the bank has the same power, under its charter, to make a contract for the loan of money as an individual, and if more than six per centum per annum had not been prohibited, it might have charged more."

It seems to me that this reasoning fully meets the objection that this note is void because the bank reserved a greater rate of interest than it was authorized to take. But what are the consequences of this act? We leave out of view, now, the question as to whether a bank would forfeit its franchises by reserving more interest than it is permitted to take by the general banking law; or whether such an act would be a good ground of forfeiture of its banking privileges, in a direct proceeding, instituted by the state, for a misuser of its franchises. This case does not call for the expression of any opinion upon that point, and of course none will be given. The banking law does not declare what shall be the consequence of taking more interest by a bank than is allowed by the banking law. It is an undoubted violation of that law, which is the charter for every bank, to reserve upon any loan more than ten per cent. interest. But as there is no penalty

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affixed in the banking law for a violation in this respect, we must look to the general, common, or statutory law to ascertain the consequences of its violation. And in the first place, we suppose that the act of the bank, in taking excessive interest, must be viewed precisely as an act of an individual. *Planters' Bank vs. Sharp et al.*, 4 S. & M., 75; *The Grand Gulf Bank vs. Richard T. Archer et al.*, 8 id., 151; *Veazie Bank vs. Paulk*, 40 Me., 109; *The Philadelphia Loan Company vs. Towner*, 13 Conn., 249.

The statute of 1856 is very general in terms, and I cannot perceive why it does not apply to corporations as well as natural persons. It was argued by counsel for the bank, that this note was not affected by the statute of 1856; for, although the rate of interest reserved was greater than the bank, by the banking law, was permitted to take, still that it did not exceed the rate which parties might contract for under this general statute. But we are of the opinion, that when a bank reserves a greater rate of interest than is allowed by its charter, that the usury law applies to it, although it does not exceed the rate prescribed by such usury law. The general usury law is to that extent modified by section fifteen of the bank law, and that section takes the place, as far as it is applicable, of the statute upon usury. Now, it will be seen that the only penalty prescribed by the statute of 1856, for taking usury, is the loss of all interest. The first section provides that the contract or security shall be valid and effectual to secure the repayment of the sum loaned, but no interest shall be recovered upon such security. I have had some difficulty in putting a satisfactory construction upon this statute. Were the first section standing alone, I should then think that the judgment of the circuit court must be reversed, upon the ground that interest was given upon the note after it became due, at the rate of ten per cent. per annum. But under the pleadings in this case, I am inclined to the opinion, that this was proper.

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The appellant does not set up usury in his answer, but alleges that the bank had no authority or power to take the note, or to enter into any contract for more than ten per cent. interest, and asked that the note be declared void. This was raising the question of the power of the bank to make the contract, insisting that it had no such power, and that the contract was void upon that ground. It is not claimed that the contract was usurous, but void, for want of capacity of the bank to make it. Now, it appears to me, that the first section of this statute is qualified and restricted by the provisions of the second section, and that they must both be construed together; and I therefore think, that the interest upon a usurous contract may be recovered, unless the party affected by the usury applies to the court to be relieved therefrom, or sets up the usury in his answer; in which case, to be entitled to any relief, or the benefit of his defence, he must prove a tender of the principal sum loaned. Suppose a party sets up usury in his answer, but fails to prove any tender of the principal sum, will the court give him the benefit of his defense? Obviously not, because the statute says that he must prove a tender of the principal sum, as a condition of having the benefit of that defense.

And in case the defendant fails to prove a tender, what would the plaintiff be entitled to recover? I think the principal and interest. If the first section of the statute is alone considered, disconnected from the provisions of the second section, it would seem to require that the court should, upon its own motion, refuse to give judgment for any interest upon a usurous contract, whenever it was made to appear that such usury had been taken. I cannot think that the legislature intended any such result as that a party setting up the usury in his answer, but failing to prove a tender of the principal sum, should be in a worse condition than one who did not set it up at all. Yet such would be the consequence, unless

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it is held that a plaintiff may recover principal and interest, when the usury is not set up in the answer, and a tender of the principal sum proven on the trial.

The conclusion at which I have arrived is, that the judgment of the circuit court is right, and must be affirmed.

WEEKS *vs.* CITY OF MILWAUKEE *et al.*

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 1, 1859.] [Decided January 4, 1860.

Constitutional Law—Assessments—Taxes—Streets—Nuisance—Injunction.

Where the city of Milwaukee levied special taxes upon the lots of W. for the purpose of building streets and sidewalks in front of the same: Held, that these assessments could be sustained on the ground that it was an exercise of the taxing power of the state and city, and was not a taking of private property for public use.

The constitutional provision, that "the rule of taxation shall be uniform," extends to all taxation by cities, towns and counties, in their exercise of the taxing power delegated to them by the state. The object of this provision was to protect the citizen against unequal and consequently unjust taxation.

"The uniform rule of taxation" provided for by Art. VIII., § 1, is applicable to municipal corporations notwithstanding the provision of Art. XI., § 3, requiring the legislature in establishing them to restrict their powers of taxation, so as to prevent abuses, &c. This last provision was designed to furnish a further protection.

Assessments of special taxes upon lots for the purpose of constructing streets and sidewalks in front of such lots cannot be upheld by the constitution of Wisconsin, under the rule of uniformity of taxation alone; but it can be, under the provision requiring the legislature to restrict the power of municipal corporations in making assessments.

The word "assessment," as used in Art. XI., § 3, of the constitution of the state of Wisconsin, has reference to the system of special taxation for municipal im-

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provements existing at the adoption of the constitution, and is a clear recognition of the existence of the power to make the special tax.

The provision of Art. XI., § 3, recognises the power of special assessments in municipal corporations, and is so far a modification of the rule of uniformity, in Art. VIII., § 1, as the system of assessment is a departure from that rule; and, thereby, every lot may be compelled to build the street in front thereof, with such exceptions as the law may provide. The only remedy for abuses under this rule is such restrictions as the wisdom of the legislature may impose on the exercise of the power.

Where, by an act of the legislature, the farming lands of W. had been annexed to the city of Milwaukee, and afterwards taxed at the same rate as other city property to pay the debt of the city: Held, that the act was constitutional, and the taxation was legal.

The case of *Knowlton vs. Supervisors of Rock Co.*, 9 Wis., 410, considered and approved.

Where the assessors of the city of Milwaukee, in obedience to an ordinance of the common council, omitted to assess property to the value of $150,000, which ought to have been assessed, and that property was thereby exempted from taxation: Held, that such omission vitiated the whole tax.

Omissions to make assessments arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws, is intrusted, do not necessarily vitiate the whole tax; but an intentional disregard of those laws, in such a manner as to impose illegal taxes on those who are taxed, does.

The provision of the taxing laws, that where there has been an omission to tax property, it may be taxed the proper amount the next year, refers to such omissions as are constantly liable to happen, and does not invalidate the whole tax; but where the omission originated in an intentional departure from the law on the part of all the authorities, it renders the tax illegal, and it cannot be cured by that provision in the taxing laws.

Where the city of Milwaukee had taxed the lots of W. to abate a nuisance created by the act of the city in the construction of streets, so as thereby to cause the water to stand upon the lots: Held, that the city has not the power to levy a special tax on the same lots to pay for filling them up so as to prevent the water from standing there; and such tax if levied is illegal.

Where the taxes on the lands of W. have been illegally increased by reason of the illegal exemption of other lands from taxation, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax.

Where a tax has been illegally assessed on the lands of W. for the purpose of abating a nuisance created by the taxing power on the same lands, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax.

The case of *Goodall vs. The City of Milwaukee*, 5 Wis., 32, considered and approved.

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This was an action commenced by Lemuel W. Weeks against the City of Milwaukee, the County of Milwaukee, and Garrett M. Fitzgerald, the county treasurer, to restrain the latter from selling the lands of Weeks for taxes. The complaint set forth that Weeks was the owner in fee simple of a large amount of real estate, consisting of fractional subdivisions of sections and town lots within the limits of the city of Milwaukee, which are particularly described, giving the several valuations. One tract of 39 acres, used exclusively for farming purposes, and which he never intended to have laid out into city lots, nor was there any call or demand for city lots at that place, had been annexed to the city limits by an act of the legislature, against his wish and consent. That this had been done at the request and procurement of interested parties, for the sole purpose of subjecting it to taxation for the purpose of paying the expenses and debts of the city. That the taxation of the property had become exceedingly burdensome, and much larger than it would have been had it not been annexed. That before the annexation of this and some of the other tracts to the corporation limits, the city was largely in debt, and that a portion of the taxes levied was for the purpose of cancelling this indebtedness. That the assessments of the city were grossly unequal, partial, burdensome and fraudulent; the assessors having knowingly and purposely assessed the property of other individuals located in the same block, lower than they had assessed the property of the complainant; and that they had knowingly and purposely omitted to assess the property known as the "Newhall House," and the land on which it stands, that is, three lots in the third ward of the city, and of the value of $200,000; and that the same was not included in the assessment roll for the year, nor any tax for state, county, school, city, or ward tax, levied upon them.

The complaint further set forth, that a special tax had been levied upon several of the lots, amounting to $498 75, $111 25 of which was assessed for the purpose of grading an alley adjoining them, and the balance, $387 50, for abating a nuisance of the lots, by filling them up, and which nuisance had been created by an act of the city in filling up a street in front of the lots; also, several lots were taxed for cleaning the streets, and building sidewalks in front of the lots. All of which was unconstitutional. The board of supervisors of the county had levied a state, county and school tax on the

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lands and lots as they had been assessed and returned. That all these several tracts had been assessed for city purposes, as well as for the several special taxes; and that the treasurer threatened to sell the lots for the special taxes, and the treasurer of the county to sell for the other taxes. Therefore the complaint prayed for an injunction to restrain the sales, &c., and a judgment declaring the taxes illegal and void.

The injunction order was allowed and served, with the complaint, on the 15th of June, 1858. On the 30th of June, the defendants procured a dissolution of the injunction; from which no appeal was taken. The defendants then answered the complaint, and showed:

1. That the defendants admit that Garrett W. Fitzgerald was the treasurer of the county of Milwaukee, and that Herman Schwarting was the treasurer of said city of Milwaukee, and that the plaintiff is a citizen of the state of Wisconsin, as stated.

2. That as to each and every allegation in the complaint, not hereinbefore specifically admitted, the defendants have not any knowledge or information sufficient to form a belief, and therefore deny the same, and ask the same benefit of this their answer as if they had demurred to the complaint for the insufficiency thereof.

3. That the defendants for further answer to the complaint, allege and submit that the plaintiff has an ample and complete remedy at law for each and all the grievances of which complaint is by him in his complaint made, without resorting to a suit in equity.

Whereupon the defendants demand judgment against the plaintiff for their costs and disbursements in this action, &c.

The cause was referred to John A. Savage, court commissioner, to take the proofs in the case, who made his report on the 5th of November, 1858; and on the 15th, the case was submitted to the circuit judge for a decision, who made the following order:

"This action was submitted on the last day or the late term without argument, with a request that a judgment might be entered *pro forma*, as it was important to obtain the ruling of the Supreme Court on the principles involved, at the ensuing term thereof. Let judgment be entered accordingly, dismissing the complaint in this cause."

From the judgment so entered this appeal is taken.

Henry F. Prentis, for the appellant, after answering the ob-

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jection that the complainant had a perfect remedy at law, by reason of the union of the two courts of law and equity in one, *Hall vs. Delaplaine*, 5 Wis., 217, proceeded to show that he was entitled to the relief prayed for in this case, and also to the injunction, provided the complaint is substantiated by the proof in the case, and the taxes, or any portion of them, are illegal. *Burnett vs. City of Cincinnati*, 3 Ohio, 72; *Bank U. S. vs. Osborn et al.*, 9 Wheat., 738; *Scott vs. Onderdonk et al.*, 4 Kern., 9.

I suppose it will not be questioned that if any portion of the tax for which the property is to be sold, or for which it has been sold, is illegal, it must have the same effect upon the sale as though the whole tax were illegal. *Stetson vs. Kempton*, 13 Mass., 272; *Libby vs. Burnham*, 15 id., 144; *Drew vs. Davis*, 10 Vt., 506; *Elwell vs. Shaw*, 1 Greenl., 339; *Doe vs. McQuilkin*, 8 Blackf., 581.

2. It seems from the complaint, the admissions of the defendants and the evidence, that the property known as the "Newhall House" property, consistings of lots 4, 5 and 6, in the third ward, and the hotel standing thereon, within the corporate limits of the city of Milwaukee, and of the value of from one hundred and fifty to two hundred thousand dollars, was knowingly and purposely omitted to be assessed for taxation in the year 1857, and that no taxes of any kind, neither state, county, school, city or ward taxes, were levied on that property. The constitution and laws of the state required that this property should be assessed for taxation, as also did the city charter. The first section of chapter 8, in the city charter, provides, that "all property, real or personal, within the city, except such as may be exempt by the laws of the state, shall be subject to taxation for the support of the city government, and the payment of its debts and liabilities." Section 1 of Art. VIII, of the state constitution says: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." The first section of chapter 15 of the Revised Statutes, in describing what property shall be liable to taxation, says: "All property, real and personal, within this state, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law." By section 2 of chap. 8 of the city charter, it is made the duty of the assessors to make out a complete and accurate assessment roll, which shall contain, as near as may be, a description and the value of all the lands, lots, or par-

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cels of land, and buildings on any lot or parcel of land, within said city, &c. This is imperative, and not directory.

There is no mistake about this matter. It is admitted that the omission was purposely made. And besides that omission we have the record evidence which gives the character of the omission. By an ordinance passed March 22, 1856, it is provided: "Sec. 2. In view of the great public benefit which the construction of said hotel (meaning the Newhall House) will be to our city, and to encourage its early completion, said hotel property is hereby exempted from all city and ward taxes and assessments for the year 1856 and 1857, provided said building shall be completed within eighteen months from the first day of May, A. D., 1856."

It was completed within the eighteen months. What then, we ask, is the effect of this purposed disregard of the law of the state by these assessors, in omitting to assess this property, and in acting under the direction of the common council of said city?

We answer, unhesitatingly, that its effect must be to render invalid the whole state, school, county, city, and ward taxes for said third ward, levied within said city of Milwaukee, for said year, 1857. *State vs. Platt*, 4 Zab., 108.

3. The legislature had not the authority to annex the homestead of the complainant to the city, and then tax it for city purposes without his consent, and thereby raise his taxes from $30 to $368, on the same property, which had been in no manner benefited by the annexation. *The City of Covington vs. Southgate*, 15 Ken. 491.

4. We claim that Weeks' sub-division of the north-west quarter of sec. 5, and the south forty acres in the north-west quarter of section 5, which property was annexed to and made a part of the city of Milwaukee, by an act of the legislature, approved March 18, 1856, cannot be taxed for the payment of debts incurred prior to the annexation.

5. "The south one-third of lot one, in block four, in the third ward, being twenty feet front, with the building standing thereon, is assessed at $4,000. The building on the adjoining twenty feet north, of equal, or more value, and the land on which it stands worth more than the first mentioned twenty feet, which last mentioned property is owned by another individual, is assessed at $3,700, for the same year, 1857. Both pieces of property were assessed by the same assessor."

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6. There is a special tax or assessment on lots 8 and 9, in block 172, in the 4th ward, of $480,50, for abating a nuisance on them, by filling up the same, which nuisance was created by the act of the city in filling up the street and alley in front of, and by the side of them. The balance of said special taxes on said lots 8 and 9, was for grading an alley adjoining said lots. We find by referring to the testimony that their natural condition was on a side hill, and that prior to the grading of the street and alley, there was no water on them, but that it ran off in consequence of the situation or lay of the land. That in filling the street and alley the lots were left at least ten feet below the grade, and not having built any sewers in the street or alley, the water, in consequence of the filling, was turned in upon them, and then, in consequence of the waters standing on the lots, the city declared them nuisances, and ordered the nuisances to be abated by having the lots filled. The plaintiff, of course, did not obey the order, and the city did the work, and then taxed the lots for the abatement. For the collection of these taxes they now seek to sell, or rather have sold them. The city could not first create a nuisance, and compel the owner to pay for abating it. *Lacour vs. Mayor of New York*, 3 Duer, 406; *Radcliff vs. The Mayor, &c., of Brooklyn*, 4 Comst., 195; *McComb vs. The Town of Akron*, 15 Ohio, 474; *The Rochester White Lead Co. vs. The City of Rochester*, 3 Comst., 463; *Goodall vs. The City of Milwaukee*, 5 Wis., 32; *Baron et al., vs. Baltimore*, 2 Amer. Jurist, 203; *Rhodes vs. The City of Cleveland*, 10 Ohio, 159.

7. In relation to the special taxes assessed for cleaning streets. So far as the fact is concerned, we think the evidence shows that the work was never done, and therefore the taxes were fraudulently assessed.

8. The next and last point in this case, to which I wish to call the attention of the court, is the question of the constitutionality of the provisions in the city charter, which make the building and repairing, and cleaning streets and alleys and side-walks, chargeable to the lots fronting on and adjoining said streets, and alleys, and side-walks, and which affects certain special taxes we ask to be set aside.

This power cannot be sustained on principle, and is in violation of § 1, Art. VIII. of the constitution. *Hill vs. Higden*, 5 Ohio St., 243; *The City of Zanesville vs. Richards*, id., 589; *The People vs. Mayor of Brooklyn*, 4 Comst., 419; *Sut-*

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ton's Heirs vs. The City of Louisville, 5 Dana, 28; *The City of Lexington vs. McQuillan's Heirs*, 9 id., 513; *Municipality No. Two vs. White*, 9 La. An. Rep., 441; *Cumming vs. Police Jury of Rapides*, id., 503.

J. A. Malley, for the county of Milwaukee, contended that this was a proper taxation of the complainant's property, and not a taking of private property for public use; and on this point he cited: *Williams vs. Detroit*, 2 Mich., 550; *Commonwealth vs. Alger*, 7 Cush. 53; *Bonsal vs. Lebanon*, 19 Ohio R., 518; *Scoville vs. Cleveland*, 1 Ohio State, 135; *Hills vs. Higdon*, 5 id., 243; *Matheny vs. Golden*, 5 id., 361; *Striker vs. Welley*, 7 Hill, 23. *New York vs. Colgate*, 2 Duer, 1; Blackwell on Tax Titles, p. 7, 13, 14, 523.

Upon the question of uniformity, it was urged that the term *uniform* as used in § 1, Art. VIII., of the constitution cannot be construed to import absolute equality, but only such an approximation to it as the class of men usually selected by the people of our state to perform the varied duties connected with the assessment and levy of taxes, by the exercise of ordinary judgment and business accuracy would attain. 6 Met., 513; 4 Zab., 108; 6 Pick., 100.

The complicated duties connected with the valuation of of property and levying taxes must be attended with frequent mistakes and omissions. The legislature of Wisconsin has provided ample remedies for all mistakes, neglects, omissions, &c. Rev. Stat., 1849, 139, § 1; id., § 24; chap. 15, § 26, Priv. L., 1849; id. § § 29 to 32, R. S., 1849; id. § 114; id. § 163; 1 Kent's Com., 461; 2 Cranch, 358; 12 J. R., 175.

The appellants objection against the validity of the taxes, is that there was "a purposed omission to assess the Newhall House property." There is no evidence of any intentional omission. It is alleged that the common council exempted the Newhall House and lots by ordinance, but it does not appear that the assessor was influenced by, or even knew of of the action of the council. The case of the *Exchange Bank vs. Hines*, is a strong case sustaining the legality of the tax nowithstanding the omission. 3 Ohio State R., 1.

The taking of said property into the city cannot alter the case in the matter of state, county, or school taxes; the property would be subject to those taxes the same *in* as *out* of the city.

Upon the point of the charge of fraud in assessments, there is no evidence; and if the allegations had been sustained by

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evidence, it would not touch the county of Milwaukee or its treasurer, as it only applies to city taxes and assessments.

We say the injunction should not be granted, because there is no necessity for any such extreme measure, and because the complaint shows no necessity for the writ of injunction. Also, that although the code may have abolished the distinction between law and equity proceedings, still it does not and cannot abolish the conservative and precautionary principles which govern the granting of the writ of injunction. By computation, we find that the extra burthen imposed upon the appellant as his share of the tax chargable to the Newhall House, amounts to about $3 70 for city taxes, and about $1 82 for county taxes.

George A. Woodward, for the city of Milwaukee, upon the question of taking private property for public use, said: This objection, it will be perceived, is based upon section 13 of the 1st article of the constitution of Wisconsin, whose language it embodies, and it is a sufficient answer to it in a constitutional point of view, that this provision of the declaration of rights has exclusive reference to the exercise of the right of eminent domain, as contradistinguished from that of taxation. These are the two essential powers upon which the very existence of our social organization depends. Both are sovereign and indispensable, to a degree that, even though no mention were to be made of either in the organic law of a state, the very institution of an organized government, under whatever form, would call them into existence. *Providence Bank vs. Billings*, 4 Pet., 559; *McCullock vs. Maryland*, 4 Wheat., 360; *The Mayor, &c., vs. G. M. Cemetery*, 7 Md., 532; *Commonwealth vs. Alger*, 7 Cushing, 53; *Cheyney vs. Hooser*, 9 B. Mon., 240; *Sutton's heirs vs. Louisville*, 5 Dana, 28; *McQuillan's heirs vs. Lexington*, 9 Dana, 513; *Williams vs. Detroit*, 2 Mich., 550; *Bonsal vs. Lebanon*, 19 Ohio, 418; *C. W. & Z. Railroad vs. Clinton County*, 1 Ohio St., 102; *Scoville vs. Cleveland*, id., 135; *Hill vs. Higdon*, 5 id., 245; *Nichols vs. Bridgeport*, 23 Conn., 189; *Doe vs. Deavors et al.*, 11 Geo., 80; *Striker vs. Kelley*, 7 Hill, 23; *Owners, &c., vs. Albany*, 15 Wend., 376; *New York vs. Colgate*, 2 Duer, 1; *The People vs. Brooklyn*, 4 Comst., 424; Sedgwick on Stat. and Const. Law, 505–6; Blackwell on Tax Titles, pp. 7, 13, 14, 523; *Brewster vs. Hough*, 10 N. H., 138; *Kirby vs. Shaw*, 7 Pa. St., 258.

Not only is the whole power of taxation lodged in the leg-

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islative branch of government, but the legislature may also delegate it, as well for special and local, as for general purposes, to a municipality or local sovereignty, subject only to such restriction as they may legally impose. *Sharp vs. Spier*, 4 Hill, 76; *Livingston vs. New York*, 8 Wend., 85; *Talbot vs. Dent*, 9 B. Mon., 530; *Stein vs. Mobile*, 24 Ala., 591; *Smith vs. Aberdeen*, 25 Miss., 458; Sedgwick on Statutory and Const. Law, 502.

On the rules of uniformity, he relied upon the decisions of *The Bank vs. Hines*, 3 Ohio St., 15; *Bonsall vs. Lebanon*, 19 Ohio, 422; *Lexington vs. McQuillan's heirs*, 9 Dana, 517; *Cheyney vs. Hooser*, 9 B. Mon., 345; *Goddard vs. Petitioners, &c.*, 16 Pick., 504; *Smith vs. Aberdeen*, 25 Miss., 458; *New Orleans vs. Duncan*, 2 L. An. R., 182; *City of Lafayette vs. Cummings*, 3 La. Ann. R., 673; *1st Municipality vs. Mannel*, 4 id., 328; *Heres vs. Powell*, 6 id., 586; *Albert vs. Brown*, 9 id., 64; *State vs. Lathrop*, 10 id., 398; *New Orleans vs. Commercial Bank*, id., 735; *Municipality No. 2 vs. Dubois*, id., 56; *Municipality No. 2 vs. Dunn*, id., 57; *State vs. Waples*, 12 id., 343; *State vs. Fuller*, 12 id., 344; Charter of the city of Milwaukee.

Section 3d, of article XI, of the Constitution, makes it the "duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their powers of 'taxation,' 'assessment,' borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations." Under this section the assessment is authorized. *Hill vs. Higdon*, 5 Ohio St., 243; *Williams vs. Detroit*, 2 Mich., 560; *Northern Liberties vs. St. John's Church*, 3 Pa. St., 107; *Canal Trustees vs. Chicago*, 12 Ill., 405; *Dean Richmond vs. City of Milwaukee*, Miller, J., in Dist. Court, Wis.; *Owners, &c., vs. Albany*, 15 Wend., 376; *The matter of Freeman St.*, 17 Wend., 649; *Thomas vs. Leland*, 24 id., 65; *Striker vs. Kelly*, 7 Hill, 23; *Town of G. vs. Connell*, 18 Barb., 615; *New York vs. Colgate*, 2 Duer, 1; *Louisville vs. Hyatt*, 9 B. Mon., 204; *Lexington vs. Louisville*, 9 Dana, 513; *The Mayor, &c., vs. Howard*, 6 Har. and John, 389; *Shaw vs. Dennis*, 5 Gilman, 405; *Nichols vs. Bridgeport*, 23 Conn., 189.

There is no provision in the constitution or laws of this state which requires that every variety of taxation, by whatever name designated, shall be "co-extensive with or extend

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to all the taxable property of a municipality or local sovereignty," nor that every municipal tax or assessment shall be laid *ad valorem;* such a plan would operate with manifest injustice upon a large proportion of its contributors.

All taxes levied for strictly municipal purposes, by towns and cities, are, in a measure, special and local, and no general provisions regulating the taxing power of the state at large, apply in such cases. *Shoalwater vs. Armstrong*, 9 Humph., 217; *New Orleans vs. Duncan*, 2 La. Ann., 183. Hence, it has been determined, in a variety of cases, that the exemption from taxation by general laws, of the lands and buildings of religious, literary, scientific and charitable institutions, will not operate to free them from those special assessments, levied by municipal corporations, for improving that portion of a street within the corporate limits, upon which they abut. *Lafayette vs. Orphan Asylum*, 4 La. Ann., 1; *Bank of New Orleans vs. City of New Orleans*, 12 id., 421; *Mayor, &c., vs. G. M. Cemetery*, 7 Md., 517; *State vs. Robertson*, 4 Zab., 504.

Upon the subject of abating the nuisances on lots 8 and 9, he said: It has long been a settled rule, that when a corporation is created by the proper authority, all the requisite powers for the accomplishment of its legitimate ends, attach by implication to the original grant. 3d Kent's Com., 8th ed., 299, notes A and B. Among the implied and indispensable powers which attach to cities, are to be included not only the establishment and regulation of streets, but the abatement of nuisances; the expenses whereof, as in the case of street improvements, and upon the same general plan, may be charged to the premises immediately concerned and affected. *Cheyney vs. Hooser*, 9 B. Mon., 338; *City of Louisville vs. Hyatt*, 5 id., 202; *Mayor, &c., vs. Howard*, 6 Har. & John., 386; *Hope vs. Doedrick*, 8 Humph., 1.

But as to this matter, the municipality of Milwaukee is not dependent even upon any implied powers, for a justification of its acts, however well defined and settled as a legal principle. Over all these things it has and exercises a discretionary supervision, and its authority is derived from the express terms of its act of creation. City Charter, ch. 7, sec. 3 and 8; *Wilson vs. New York*, 1 Denio, 600.

Upon the exemption of the Newhall House, &c. This was but the exemption of an unfinished improvement, and grew out of and but followed the custom, as old and broad as the

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city itself, of omitting from the assessment roll all buildings and improvements upon lots in an unfinished state; a custom so well and generally understood and acted upon throughout the city, as to form an undeviating rule, claimed upon the one hand, and conceded upon the other.

It is needless to add, that this rule is consonant with the best theories of governmental support. A building in course of construction has no value which forms a true basis of taxation. Its materials are no longer merchandise, to be disposed of at a profit; they afford no income, yield no rent. Smith's Wealth of Nations.

The right of the legislature to make like emptions, and for like considerations, and the legal obligation to adhere to them, have been repeatedly affirmed. We append a few leading cases upon this point: *New Jersey vs. Wilson*, 7 Cranch, 164; *Gordon vs. Tax App. Ct.*, 3 How. U. S., 133; *St. Bank vs. People*, 4 Scam., 303; *Brewster vs. Hough*, 10 N. H., 138; Tax Cases, 12 Gill & John., 117.

It is not pretended that the property of the appellant was assessed above the rate per cent. which the law authorized, for any of the purposes of taxation, and we submit, in view of the circumstances and conditions of the said exemption, that even if by a strict construction of the powers delegated by the legislature to the city of Milwaukee, the authority to exempt any species of property from taxation, does not exist; yet when the city at large, acting through its delegates in council, in good faith and for am ample equivalent, as in the case at bar, does in fact make such exemption, it is neither legal or equitable for a member of the corporation to withhold the payment of his quota of taxes duly assessed, upon the plea of the illegality of the exemption. It may be that a succeeding board of councilmen might have repudiated it, on behalf of the city, and cause the property to be assessed for the years in which it was omitted, without any redress on the part of the owner, for want of legality in the exemption, and perhaps the officers charged with assessing and collecting taxes, would have been justified in treating the ordinance above stated as a nullity, however inequitable or unconscionable such a course might be; but as between the municipality and one of its constituent members, we apprehend no action will lie upon the chancery side of the court. If permitted, it would open the door to interminable difficulties, and the wheels of government would be clogged at every turn. The

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question is novel, and almost barren of authorities. The following cases will be found to favor the views which we have expressed: *Page vs. St. Louis*, 20 Mo., 136; *Ins. Co. vs. Yard*, 17 Penn. St., 331; *Williams vs. School Dist.*, 21 Pick., 75; *George vs. School Dist.*, 6 Met., 497; 4 Met., 601; *Wiggins vs. New York*, 9 Paige Ch., 18; *State vs. Quaife*, 3 Zab., 90.

But, independent of the foregoing views, there is no occasion to disturb, much less to annul, the proceedings of the assessors. No rights have been compromised, no interests destroyed. If the exemption were unauthorized, the deficit thereby created for the year 1857 may yet be made good, by following out the provisions of the statute, which open wide the door for the correction of any such error. R. S., chap. 18, § 27.

The point which is urged upon the court, that "taxes were levied upon such property for purposes for which said property was not liable to be taxed," is intended, we conjecture, to cover the alleged illegality in the annexation of appellant's property to the city of Milwaukee, and the subsequent taxation and assessment thereof for city and ward purposes.

Over this matter we apprehend the court has no jurisdiction. It does not sit to annul or revise the acts of the law making power, however unwise or inexpedient, as it would seem from the complaint in this case. Nor does it matter that the appellant "protested" against the act which brought him, with his homestead and his subdivision, into the corporate limits. It is sufficient that the legislature in the exercise of a proper discretion, passed the act annexing this property, and subjecting it to the same "laws, regulations and ordinances," governing the wards to which it became attached. Local Laws of 1857, p. 144.

This is, comparatively, a new question. In the course of the hurried examination which we have been compelled to make, we have not been able to find that it has come up for judicial examination in any other state than Kentucky, whose reports contain two cases, adjudged upon the precise issue which is here presented. *Cheyney vs. Hoover*, 9 B. Mon., 330; *Sharp vs. Dunaran*, 17 id., 223.

In opposition to the allowance of an injunction, he relied upon chap. 18, §§ 75 to 95, Rev. Stat., 1849; *Doe vs. Deavors*, 11 Geo., 79; *Williams vs. Detroit, supra;* §§ 154–5, chap. 18, R. S., 1849; *LeRoy vs. New York*, 4 J. C. R., 352; *Moores vs. Smedley*, 6 id., 27; *Wiggins vs. New York*, 9 Paige, 18; Sto-

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ry's Eq., 896; Willard's Eq., 361–2; id., 380; Eden on Inj., 227, Waterman's note, 1; *Mayor, &c., of Brooklyn vs. Meserole*, 26 Wend., 130; 4 Kern., 540; *Attorney General vs. Nichol*, 16 Vesey, Jr., 341; *Van Doren et al. vs. New York*, 9 Paige, 388; *Loomis vs. Spencer*, 1 Ohio St., 153; *Stevens vs. Beekman*, 1 J. C., 318; *Jerome vs. Ross*, 7 J. C., 333; *Livingston vs. Hollenbeck*, 4 Barb., 16; *Van Rensselaer vs. Kidd*, id., 18; *Cox vs. Clift*, 2 Comst., 118; *Scott vs. Onderdonk*, 4 Kern., 12.

It may be claimed, however, that inasmuch as the distinction heretofore existing between actions at law and in equity, are abolished by sec. 8 of chap. 122, of the Rev. Stat., and were so abolished before the commencement of this action, the court should take jurisdiction over it, and grant the relief prayed; but this position, if it could be sustained, would only embarrass the appellant, inasmuch as a court of exclusive common law jurisdiction is not empowered to issue the writ of injunction at all. This is a distinctive feature of a court of equity, and by whatever name the tribunal may be called in whose hands this power is lodged, it is, nevertheless, the peculiar exercise of chancery jurisdiction. *Livingston vs. Moore*, 7 Peters, 546.

At most the code has only abolished the old distinctive forms of pleading; had they attempted more, the constitution would have interposed its forbidding mandate.

They have neither enlarged nor diminished the powers of the court, as to either matters of law or equity, and the principles which have always governed and distinguished the two systems, remain the same, and the same judgments and decrees are arrived at now as formerly, under different names and forms. Nor does it matter that in this state we have no courts of chancery, as distinct from court of law, so long as the jurisdiction remains unimpaired. Voorhies Code, 1857, 210, note g.; Whittaker's Practice, vol. 1, p. 306–7–8; *Tuttle vs. Smith*, 14 How. Pr., 395; *Voorhies vs. Child's ex'r*, 3 Smith, N. Y., 357.

But we go further, and insist that not only has the appellant failed to bring himself within any known rule of equitable interference, but his case comes short of any wholesome precedent which has come under our notice, of a revision and determination of like questions upon certiorari in courts of law. In denying their jurisdiction, where it was unquestioned, the courts of England and of this country, have placed such denial upon the ground of the *public inconven-*

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ience which would ensue, from any interference with the duties of such of the subordinate officers of government as are invested with discretionary powers, especially as regards the matter of assessment and taxation, which should not be interrupted for any lighter cause than the violation of the organic principle upon which it rests. *Lawton vs. Cambridge*, 2 Caines, 181; *Stafford vs. Albany*, 6 John. 4; *People vs. Queens*, 1 Hill, 195; *People vs. New York*, 2 Hill, 12; *Matter of Mt. Morris Square*, 2 Hill, 14; *People vs. Alleghany*, 15 Wend., 198; *Ex Parte Mayor of Albany*, 23 Wend., 277; *Railroad Company vs. Canaan*, 16 Barb., 249; *Weaver vs. Davendorf*, 8 Denio, 119; *People vs. Brooklyn*, 4 Comst., 44.

By the Court, PAINE, J. This action was brought by the appellant to restrain the sale of a large quantity of real estate, for taxes, upon several alleged grounds of illegality. A large share of the real estate consisted of city lots, and a corresponding share of the taxes was for assessments against these lots, for building streets, sidewalks, &c., under the charter of the city.

The most important objection urged against their legality is, that the provisions of the charter itself authorizing these assessments, are a violation of the constitutional provision, that "the rule of taxation shall be uniform." I have no doubt, if these assessments are to be sustained at all, that it must be done upon the ground that they are an exercise of the taxing power. It is true, there are many cases in which it has been said that they are not taxes; but when Justice Barculo, in *The People vs. Brooklyn*, 6 Barb., 209, carried out this doctrine to its logical result, and held that not being taxes, they were the taking of private property for public use, without compensation, the court of appeals, in order to avoid his conclusion, were compelled to uphold them, as an exercise of the taxing power. 4 Coms., 419.

I have also no doubt that the constitutional provision that "the rule of taxation shall be uniform," extends to taxation

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by cities, towns, and counties, exercising, as they do, a portion of the sovereign power delegated to them by the state. It is true, as I had occasion to contend in the case of *Clark vs. The city of Janesville, supra*, 165, that most of the provisions of Article VIII, where this is found, apply to the action of the state as such, and not to the action of its minor political divisions. A city or county is not the state; and if it contracts a debt, that is not a state debt. But when either exercises the taxing power, it is acting for the state, as taxation is an attribute of sovereignty. Where, therefore, the constitution requires "the rule of taxation to be uniform," I think it extends to all taxation by the state, whether acting directly, or by delegating its authority to political corporations. The object of this provision was to protect the citizen against unequal, and consequently unjust taxation. And this object would clearly be defeated if the state, by delegating the power, placed its agents beyond the restriction of the rule. And this view, I think, is not impaired by the provision of Art. XI, § 3, requiring the legislature, in establishing municipal corporations, "to restrict their powers of taxation so as to prevent abuses," &c. Restrictions may be, and undoubtedly are necessary, to prevent abuses which might not amount to violations of the rule of uniformity. There may be a uniform abuse of the taxing power, by reckless and improvident management on the part of these local authorities; and I think the provision last mentioned was designed to furnish a further protection, in addition to that furnished by the rule of uniformity.

Believing, therefore, that these assessments are an exercise of the taxing power of the state, and that the rule of uniformity extends to taxation by corporations, I should find it impossible to uphold them, if the provision requiring the rule to be uniform was the only provision in the constitution bearing upon the question. I think with Chief Justice Bart-

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ley, in *Bank vs. Hines*, 3 Ohio St., 15, that "Uniformity in taxation implies equality in the burden of taxation." This equality in the burden constitutes the very substance designed to be secured by the rule. But the principle upon which these assessments rest is clearly destructive of this equality. It requires every lot owner to build whatever improvements the public may require, on the street in front of his lot, without reference to inequalities in the value of the lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefitted by their construction. Corner lots are required to construct and keep in repair three times as much as other lots; and yet it is well known that the difference in value bears no proportion to this difference in burden. In front of one lot, the expense of building the street may exceed the value of the lot, and its construction may impose on the owner additional expense, to render his lot accessible. In front of another lot, of even much greater value, the expense is comparatively slight. These inequalities are obvious; and I have always thought that the principle of such assessments was radically wrong. They have been very extensively discussed, and sustained upon the ground that the lot should pay because it receives the benefit. But if this be true, that the improvements in front of a lot are made for the benefit of the lot only, then the right of the public to tax the owner at all for that purpose fails; because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose; and it being once established that the construction of streets is a public purpose, that will justify taxation, I think it follows, if the matter is to be settled upon principle, that the taxation should be equal and uniform, and that to make it so, the whole taxable property of the political division in which the improvement is made, should be taxed by a uniform rule, for the purpose of its construction.

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But in sustaining these assessments, when private property was wanted for a street, it has been said the state could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then, having got the land to build it on, and the power to tax by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it. I think this is the same in principle, as it would be to say, that the town in which the county seat is located, should build the county buildings, or that the county where the capitol is, should construct the public edifices of the state, upon the ground that, by being located nearer, they derived a greater benefit than others.

If the question, therefore, was, whether the system of assessment could be sustained upon principle, I should have no hesitation in deciding it in the negative. I fully agree with the reasoning of the supreme court of Louisiana, in the case of *Municipality No. 2, vs. White et al.*, 9 La. An. Rep., 447, upon this point.

But the question is not whether this system is established upon sound principles, but whether the legislature has the power, under the constitution, to establish such a system. As already stated, if the provision requiring the rule of taxation to be uniform, was the only one bearing upon the question, I should answer this also in the negative. But there is another provision, which seems to me so important, that it has changed the result to which I should otherwise have arrived. That provision is sec. 3, of Art. XI, and is as follows: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in *assessments* and taxation,

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and in contracting debts, by such municipal corporations."

It cannot well be denied, if the word "assessment," as used in this section, had reference to this established system of special taxation for municipal improvements, that then it is a clear recognition of the existence and legality of the power. Had it such meaning? I think it had, for the following reasons: This system of special taxation, upon the basis of supposed special benefits, had existed for years, and given rise to much discussion and litigation in the older states. Although, in itself, being strictly an exercise of the taxing power, yet it has been frequently assumed otherwise, and has been so far separated and distinguished from general taxation, as to have obtained a distinct name, and that name assessment. As such it has been known and described for a number of years in the older states, in their contracts, laws, and constitutions. A clear distinction between it and other taxation was established. It seems to me, therefore, that when the constitution expressly recognizes the "power of assessment" in municipal corporations, it had reference to this system which had been so long known and described under that name. It was suggested on the argument that it meant the assessment of taxes generally. But I cannot see how this idea can be sustained when the word "taxation," which includes all the steps necessary to taxation, immediately precedes the word "assessment." It is said the legislature may "restrict their power of taxation, assessment, borrowing money," &c. Now, to say that the word "assessment," as here used, had reference to the assessment of taxes generally, is to make the instrument guilty of a useless, as well as awkward repetition. Having first covered the whole ground by the word "taxation," it would then go back to go over a part of it again, by the word "assessment," which is only one step in taxation. Such a use of language would be exceedingly constrained and unusual in any instrument, and

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particularly so in a constitution which usually deals in general terms, without going into details. If any tautology at all was to be looked for there, it should be in the use of some word of equivalent meaning to the one already used, and not of one expressing only a small part of it. I think, also, that the word "assessment," having reference to the general assessment of taxes, has never in common practice been used alone, as expressing that idea. On the contrary, where that is the idea to be conveyed, it is said, "the assessment of taxes," as men say, "the levying of taxes," or "the collection of taxes." But it has an established meaning when used alone, and that is this specific taxation. The word "assessment," then, includes all the steps necessary to this taxation, just as the word "taxation" includes all necessary to taxation generally. And when I find the constitution recognizing in municipal corporations the power of "taxation *and* assessment," I cannot resist the conclusion that this latter word had reference to that particular species of taxation known as a whole by that name. And if it did, it is a clear recognition of the power, and the question here being only as to the power, is conclusively determined by it.

The same effect was given to the same clause in the constitution of Ohio, by the supreme court of that state, in a recent decision in the case of *Hill vs. Higdon*, 4 Ohio St., 243. And the reasoning of Chief Justice Ranney upon the question, I think it impossible to answer.

This provision, then, recognizing the power of assessment in municipal corporations, is so far a modification of the rule of uniformity, as the system of assessment is a departure from that rule. And the principle of it being, as before stated, to compel every lot to build the street in front of it, with such exceptions as are usually provided in cases of extraordinary expense, and which exist in the charter of Milwaukee, it cannot be said that under the constitution con-

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struing the two sections together, and giving due effect to both as we are bound to, the legislature has not the power to authorize these assessments. For whatever abuses may be practiced under it, and they are doubtless great, the only remedy is in such restrictions as the wisdom of the legislature may impose on the exercise of the power, and for every citizen of these corporations to faithfully discharge his duty as such, and give necessary attention to the administration of public affairs, and not leave them to the exclusive management of plundering mercenaries, and then groan under the oppressions that result.

Another alleged ground of illegality is, that certain farming lands of the plaintiff, which had never been laid off into lots, and were not needed for city purposes, had been annexed to the city by an act of the legislature, and afterwards taxed at the same rate as other city property. I think this objection resolves itself entirely into a question whether the legislature has power to annex adjoining territory to a municipal corporation. Because, if such power exists, and this land *was* annexed, it seems very clear that it must afterwards be taxed by the same rule as other property in the political division where it then belongs. The rule of uniformity would require this. And we have held at the present term, in the case of *Knowlton vs. Supervisors of Rock Co.*, 9 Wis., 410, that no discrimination could be made in such case, between lands in the same taxing district, so that a part should be taxed at one rate upon their value, and the rest at another. And this seems so clear, that while counsel apparently conceded that the legislature might annex the lands for some purposes, he yet claimed that they could not do it for taxing purposes, but for these it was still a part of the town in which it was previously located; but I think this position cannot be sustained. Such a rule would be impracticable, and to sustain such a double ambiguous character for any district, must lead to

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great confusion and uncertainty. If the power exists to annex, when it is exercised, the district must be annexed for all purposes. Whether it is a wise or just exercise of the power, courts cannot inquire. Those are questions for the legislature. Parties owning lands upon the borders of cities, must hold them subject to their disadvantages, as well as advantages. If when thus annexed, they are subject to undue burdens, this is, perhaps, in some measure compensated by the fact that before being annexed they had long enjoyed great advantages from their vicinity to a prosperous city, without contributing anything towards the burdens of building it.

But an objection is made to the legality of the general tax of that year, which I am compelled to sustain. It appears from the case, that several lots in the city upon which the Newhall House was in process of erection, of the value of from $150,000 to $200,000, were purposely omitted to be taxed, and no state, county, city, ward, or school tax levied or assessed upon them. It appears from the complaint and stipulation of the parties, that this omission was intentional on the part of the city authorities. And it was conceded on both sides, that an ordinance was passed by the common council expressly exempting that property from taxation for the years 1856 and 1857, "in view of the great public benefit which the construction of the hotel would be to the city."

I have no doubt this exemption originated in motives of generosity and public spirit. And perhaps the same motives should induce the tax payers of the city to submit to the slight increase of the tax thereby imposed on each, without questioning its strict legality. But they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights.

That this exemption was illegal, was scarcely contested. I shall therefore make no effort to show that the common coun-

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cil had no authority to suspend or repeal the general law of the state, declaring what property shall be taxable and what exempt. But the important question presented is, whether, conceding it to have been entirely unauthorized, it vitiates the tax assessed upon other property? And upon this question I think the following rule is established, both by reason and authority. Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes on those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties, should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided, is absolutely essential to a continuation of government. But it seems to me clear that the other part is equally as essential to the just protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers, who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control. I know of no considerations of public policy or necessity, that can justify carrying the rule to that extent.

And the fact that in this instance the disregard of the law proceeded from good motives, ought not to affect the decision of the question. It is a rule of law, that is to be established;

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and if established here, because the motives were good, it would serve as a precedent, where the motives were bad, and the power usurped for purposes of oppression.

In *Henry vs. Chester*, 15 Verm., 460, the court says: "It is indispensable to the legality of any tax imposed by the town, that it should have been made upon a list of the polls and rateable estate of the inhabitants, in substantial and *bona fide* compliance with the requisitions of the statute." And again, "Upon two grounds then, we think this was a void list. 1. The plain and obvious requisitions of the statute in regard to making up the list, were disregarded both by important and essential *omissions*, and by *arbitrary additions*, without even the color of right or legal warrant. If this may be done, and still the list be regarded as legal, so might it with equal propriety, if the entire real estate in town were omitted, or inserted wholly at random, without even the form of an appraisal."

The court also quotes the following rule as stated by Chief Justice Shaw in *Torrey vs. Milburry*, 21 Pick, 65: "One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for securing an equality of taxation," &c., "are *conditions* precedent, and if they are not observed, he is not legally taxed, and he may resist it." True, the court then adds, as a qualification of the general proposition, "that these measures, in order to become 'conditions precedent,' must be such matters as enter into the frame work of the assessment, and affect its principles and not its detail merely." But it is evident from the remark before quoted, that they considered "important and essential *omissions*," "without the color of right or legal warrant," as having such effect. And it seems very evident that they would have. Because one of the essential elements of the validity of a tax is, that it should be assessed upon a list embracing the taxable property of a district, made out with as much ac-

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curacy as results from a *bona fide* attempt on the part of those who make it, to fulfill their duty according to law. And when such a list is not had, but instead of it one in which those whose duty it was to make it, have intentionally included only a part of the taxable property, and left out an important part, the essential basis of a legal tax fails, and the necessary result is a destruction of that "equality of taxation," all the "measures" to secure which, in the language of Chief Justice Shaw, are "conditions precedent" to the legality of the tax.

In the subsequent case of *Spear vs. The Town of Braintree*, 24 Verm., 414, the same rule is reasserted, though in that case, they held the error complained of to be a mere error in judgment, in a *bona fide* attempt to fulfill the duties of the office according to law. And they distinguish it from the case of *Henry vs. Chester*, by saying: "That case was decided, as it was, chiefly upon the ground that the defects in the list could not be fairly regarded as accidental or *bona fide*.

In *The State vs. Brannin*, 3 Zab. N. J., 484, it was held, that where an assessment was made in the city of Trenton for city and county purposes, a separate poll tax being required by law for the city tax, and only one poll tax was assessed, the whole assessment was void.

In the subsequent case of *The State vs. The Collector of Jersey City*, 4 Zab., 108, the assessor had omitted to assess the churches, and the court held that it did not avoid the whole tax. But they place it upon the ground that it was a practice that had universally prevailed in the state, and in accordance with a contemporaneous construction of the law, "which they would probably have sanctioned had the question been formerly raised." It is true they add that for an omission to assess property really taxable, the assessment ought not to be held void, but that it is a matter to be left to the vigilance of the assessor. But they qualify this by

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adding, "unless it be in cases involving a palpable and greatly injurious disregard or misconstruction of plain requirements of the law.

But the counsel for the city rely strongly on the case of *Page vs. The City of St. Louis*, 20 Mo., 136. In that case an act of the legislature had established a system of sewerage in St. Louis, and provided that the real estate in each district should be taxed annually to pay the debt, for which the city was authorized to issue its bonds. The city passed an ordinance for the creation of a sewerage fund, and providing that any of the tax payers, who would pay into this fund such proportion of the whole debt as the assessed valuation of his taxable property bore to the whole assessed valuation in his district, should be thereafter exempt. A certain party had availed himself of this privilege, and afterwards placed further improvements on his property, rendering it more valuable, and it was no longer taxed for the sewerage debt. The plaintiff, who was taxed, complained that this exemption vitiated his tax. But the court decided against him, expressly on the ground that it did not appear that his tax was at all increased by the exemption, nor that the party who had advanced his proportion of the whole debt had not paid all that he ought to pay.

But this case is entirely different, for here it is conceded that the plaintiff's tax, as well as that of all the other tax payers was increased, by the omission of the Newhall House property. It is true the court indulges in some general remarks on the inconvenience of arresting the proceedings of a city, and close by saying: "The right of a corporation *de facto* will be enforced. It is no defense to the claim of a corporation that it has violated its charter." If by this it was only meant that when a corporation is enforcing a legal claim, it is no defense to say it has violated its charter in some other matter; that may be conceded. But if it was

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meant to say, that when a corporation is enforcing an illegal claim, which is itself a violation of its charter and the law, and works injustice upon the defendant, it is no defense to show such violation, I, for one, must be permitted to dissent. I do not understand that even to avoid a suspension of corporate proceedings, it is proper to break down all barriers against illegal taxation, and say that a city may enforce the collection of an illegal tax just as well as though it were legal.

In *Wiggins vs. New York*, also cited, the decision is only that the court of chancery would not interfere on account of errors of judgment in the commissioners assessing benefits and damages on opening streets, the proceedings having been regular. And in examining some of the alleged irregularities, the court sustained the proceedings on the ground that they did "not increase the assessments" upon others, implying, if they had, they must be held illegal.

The case of *The Ins. Co. vs. Yard*, 17 Penn. St., 331, was evidently a case of omission of a part of the taxable property from mistake or ignorance of the fact on the part of the assessors. The language of the court contemplates only such omissions, and contains nothing which shows they would have held the same in regard to an intended omission on the part of all the authorities levying and collecting the tax of a large portion of taxable property, and assessing its proportion upon the other tax payers.

In *Williams vs. School District*, 21 Pick., 75, the assessors had omitted to tax one of the inhabitants of the district because he was very poor, and they expected he would soon come upon the town. The court say, "If this was done through error of judgment, or any error or mistake of the law in this respect, it does not invalidate the whole tax, and the case shows nothing more." I understand the error of judgment here referred to, to mean only such errors on the part

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of officers as to what the law required of them, and not an error of judgment by which, knowing what the law was, they supposed they had a right to repeal or suspend it. It cannot be said here that the omission occurred from an error of judgment, by which it was supposed the Newhall House property was not taxable by law. The very fact of passing an ordinance to exempt it, implies knowledge that it was taxable. The only error of judgment here, was in supposing they had a right to suspend the law, and relieve a part of the taxable property, and impose the additional burden on the rest.

Nor do I think that provision of the law, that where there has been an omission to tax property, it may be taxed the proper amount the next year, should change the result. That evidently refers to such omissions as are constantly liable to happen, but which do not invalidate the tax assessed. But where the omission originates in an intentional departure from the law on the part of all the authorities, and is of such a character as renders the tax illegal, I do not think this provision can cure it. For it cannot be assumed that those who paid the illegal tax would continue tax payers long enough to get back, substantially, what they had paid, under the operation of this provision. The only question, in my judgment, is whether the tax is legal or not.

I am also of the opinion that the tax assessed against the plaintiff's lots to abate a nuisance, which, it appears, was created entirely by the act of the city, in so constructing a street as to cause the water to flow and remain upon the lots, which it would not otherwise have done, is illegal. I cannot recognize the right of a corporation to create a nuisance on the lot of an individual. But to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this

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conclusion results from the reasoning of Mr. Justice Smith, in *Goodall vs. Milwaukee*, 5 Wis., 32, which I fully approve. And until I am prepared to say that private rights must yield, even to the extent of total destruction, rather than place any impediment in the way of whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen without making him any compensation for the damage, and then tax him to abate it.

We were pressed, as courts always are on such occasions, to make a decision that would avoid the inconveniences resulting from holding the tax illegal. Those inconveniences may not be as great as was supposed. It would not follow from such a decision that those who had voluntarily paid it could recover it back. But whatever they may be, I am sure they cannot exceed the evils of holding that the citizen has no protection against illegal taxation. Courts have too frequently yielded to such appeals, and to avoid some immediate inconvenience, have decided cases differently from what they otherwise would, overlooking the more remote, but at the same time greater evils, of bad precedents, in the introduction of a pernicious principle into the administration of justice.

I think the plaintiff was entitled to an injunction restraining the sale of his lands for the general tax, which was increased by the illegal exemption, and for the nuisance tax, but not for the other assessments, and that the judgment should be reversed with costs.

The judgment is reversed, and cause remanded for further proceedings.

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SOENS et al. *vs.* CITY OF RACINE.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard October 7, 1859.] [Decided January 4, 1860.

Assessments—Taxes—Jury—Commission—Agent—Public Improvement—Municipal Corporation.

The cases of *Lumsden vs. City of Milwaukee*, 8 Wis., 485, and *Weeks vs. City of Milwaukee, supra*, 242, considered and approved, in relation to assessments by municipal corporations.

Where the charter of the city of Racine provided, among other things, that the city council should have power to make piers, breakwaters, &c., for securing the lake shore within the city limits, to let the contract for their building to the lowest bidders, to levy a tax to pay for the same upon the wards or lots, which a jury of six, selected by the council, should determine, according to the benefit received: Held, that such proceeding was not a jury trial, but a special proceeding in the nature of a commission for a public purpose; and the voice of a majority would prevail in making the assessment.

Where there is a delegation of a power for a private purpose, all must concur in the act to be done to make it valid, unless otherwise provided by the parties delegating the power; but where the power is intrusted for a public purpose a majority will govern, and their act is the act of the whole.

The charter of the city of Racine provided that the council should not levy a tax to exceed $5,000 a year for current expenses, without a petition signed by fifty tax payers; nor without a vote of the tax payers, before making the levy: Held, that this provision did not apply to an assessment to make piers and breakwaters to protect the lake shore of the city.

Assessments upon certain lots for the purpose of constructing piers, &c., is not an appropriation of private property for public use, &c., it is merely the exercise of the taxing power for the public benefit.

The legislature are not authorized to levy a tax for merely private or individual ends. The authority delegated to the legislature, and by them transferred to the municipal corporation, is to be exercised only for some object of public or common interest.

Though private property may be directly or indirectly protected, or private interests promoted by a given improvement, it furnishes no rule for deciding that the improvement is not public.

To determine whether a matter is of public or merely private concern, it is necessary to consider, not whether the interest of some individual will be promoted; but whether the whole, or the greater part of the community will be so.

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This action was commenced by Peter Soens and others, against the city of Racine, to obtain a perpetual injunction restraining the city of Racine from collecting a special tax levied upon the lands of the respondents to pay a part of the expense of building certain piers, breakwaters, and protections, for the purpose of securing the lake shore in the second ward of the city from the encroachment of the waters of Lake Michigan.

The case was heard at the December special term of the court, 1857, upon bill and answer, and the following facts are admitted by the pleadings, and were also admitted by the parties on the hearing:

1. That in the year 1856, the city council of the city of Racine, caused to be constructed certain piers, breakwaters, and protections, for the purpose aforesaid, in the second ward, the whole expense of which was about $8,000; that the plan of the same was submitted to the city council, in writing, and a careful estimate of the cost thereof made, before such improvement was authorized by the city council; and after the same was so authorized by the council, the building thereof was let by contract to the lowest bidder, after giving the notice of such letting required by sec. 9, of chap. 134, of Session Laws of 1852.

2. That as soon as the contract was let, the city council selected a jury of six freeholders in the manner and having the qualifications required by sec. 10, of chap. 134, above mentioned, to make the assessment required; that the jury, in discharge of that duty, assessed $2,000 of the cost of such improvement upon the second ward at large, and the balance of such cost they assessed upon a large number of lots in the ward, upon the lands required by sec. 10, a part of which are the lots of the complainants as set forth in the bill, and that all of the jurors acted in making such assessment.

3. That the jury made their return of such assessment to the city council as required by sec. 10; which return was signed by but five of the jurors. The assessment was approved by the city council, and was added to the taxes levied upon the ward, and upon the lots respectively, in the next annual tax list upon the ward, as required by sec. 11.

4. That before the improvement was authorized a petition for the same, signed by more than twenty freeholders of the second ward, was duly presented to the city council, but no election was ever held in the city, or in any ward thereof, for

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the purpose of voting upon the question of making such improvement.

The circuit judge, after argument and deliberation, gave the following opinion and decision in writing:

The bill in this cause is filed to restrain the collection of a tax in the second ward of the city of Racine, and remove the cloud created thereby upon the title of lands owned by the complainants in that ward. By agreement of parties, all questions as to the nonjoinder or misjoinder of complainants are to be overlooked and disregarded by the court, liberty being given to the complainants to amend their bill in that respect, as they shall be advised, so as to enable the court to pass upon the merits. The power of the court to interfere by its writ of injunction and restrain the collection of a tax has been questioned, and, without doubt, upon grounds of public policy should be seldom exercised.

This power, however, has been exercised in some instances, and in the case of *Carpenter vs. Walker*, not reported, our supreme court have distinctly sanctioned its exercise in those cases where an illegal tax is attempted to be enforced against real estate, thus creating a cloud upon the title.

By section 11, of the act amending the city charter, passed in 1852, it is provided that whenever the assessment shall be completed and filed with the city treasurer, the same shall become a lien upon the lots, assessed from the time of such filing. The assessment in this case therefore, became a lien upon the complainants' lots from the time of its filing with the city treasurer, and at the time of the filing of their bill, was a cloud upon their respective titles, the lien to be enforced only against the property, and not collectable by distress and sale of goods and chattles.

The special tax in question was levied for the purpose of constructing piers and breakwaters, for the protection of the shores of Lake Michigan, against the encroachments of the lake, under the provisions of the act above referred to, which points out the manner in which the assessment shall be made, and the tax levied to pay for such improvements.

The common council, in this case, attempted to pursue the course pointed out in the act, for the construction of these improvements, and the assessment and levy of the tax in question, and, on the whole, I am inclined to regard their action as a substantial compliance with the law. It is true

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that the question was not submitted to the tax payers of the ward, but this being a special assessment for this particular improvement, I am of opinion that it is not a tax for city or ward purposes, within the meaning of section 3 of the amendment of 1852. I can discover no constitutional objection to the number of jurors who made the assessment, or to the fact that but five of these acted in the premises. This was not a proceeding according to the course of the common law, nor one where the parties were entitled to the verdict of a common law jury, under the provisions of our constitution. And were this a case of an ordinary assessment for street improvement, upon the adjoining lots, under the provisions of section 33 of the charter, I should be disposed to uphold the power, although it has been sometimes seriously questioned. *The People vs. Mayor of Brooklyn*, 6 Barber, 209; also 9 Barber, 536.

In this case, however, the tax is levied for the protection of private property, and for an object in which the public have really no interest. It is, in fact, saying to a man, that he shall contribute a certain sum towards an improvement upon his own property for his own benefit, and that his neighbors shall pay the balance *nolens volens*. This certainly cannot be regarded as a proper exercise of the taxing power, for it is unequal, and upon what principle it can be justified I am unable to conceive. Constitutions certainly are of little use if they will not protect us against such an exercise of the taxing power. I am of the opinion that the levy of this tax was an act unauthorized, unconstitutional, and void, and I direct a decree for a perpetual injunction against its collection.

J. M. KEEP, Circuit Judge.

Dated June 10, 1858.

A decree or judgment was thereupon entered for a perpetual injunction, in accordance with the opinion. From which the defendant appeals to the supreme court.

W. P. Lyon, for the appellant.

Paine & Millett, for the respondents.

By the Court, Dixon, C. J. The point principally relied upon in argument by the respondent's counsel to sustain the

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judgment of the circuit court, namely, that the assessments complained of violate the first section of the seventh article of the constitution, has been already disposed of by the decision in the cases of *Lumsden vs. The City of Milwaukee*, 8 Wis., 485; and *Weeks vs. The City of Milwaukee et al.*, made at the present term of this court, *supra*, 242. The remaining points will be disposed of in the order in which they are made by the respondent's counsel.

1. It is said that the report of the *five* jurors was illegal and did not authorize the city counsel to make the assessment. The 9th section of chap. 134, Laws of 1852, entitled "an act to amend an act to incorporate the city of Racine, &c., provided among other things, "that the city council should have power to authorize the construction of suitable piers, break waters, and such other protections as might be planned or devised for the purpose of securing the lake shore within the bounds of said city, from the encroachments of the waters of lake Michigan, and to levy a tax in the manner thereinafter specified, upon the lots and ward or wards benefitted or rendered more valuable thereby;" but that no such improvement should be authorized by the city counsel until a plan of the same should have been submitted in writing, and a careful estimate of the cost made; and that the same when authorized, should be let to the lowest bidder or bidders, reasonable notice having been first given of the time and place of receiving bids, and that the contract price should be the maximum to be raised, as thereinafter provided for. By the 10th section it was provided "that as soon as the contract price of any such improvement should be ascertained, the council should select a jury of six freeholders in like manner as they were then selected, to appraise the damage on opening streets, and in no way interested in said improvements, or the lots and ward or wards benefitted thereby, whose duty it should be faithfully and impartially to assess the costs of said im-

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provements upon the lots and ward or wards benefitted either immediately or in prospect, assessing such proportion upon the ward or wards as shall be just and equitable, and the remainder upon the lots benefitted thereby, having proper referenced to the present protections and situation of said lots, and the amount of benefit each received therefrom; and that such jury should make return to the city council in like manner as was then provided for making returns for appraisal of opening streets."

It is apparent from these provisions, that the proceeding was in no respect like a common law trial by jury. The return was unlike a verdict. It was a special proceeding in the nature of a commission, and the persons empowered to execute it, though called *jurors*, were really, by the nature of the duties imposed, *commissioners*.

By the agreed case it appears that all the requirements of these two sections were complied with by the city council up to and including the selection of the jury, and that the jurors *all acted* in discharge of the duties imposed upon them, and performed every thing required, except that the return of the assessment was signed by only *five* instead of the whole number of jurors. It is a rule of law too well settled to admit of doubt or dispute, that where there is a delegation of power for *a purpose merely private*, that all the persons to whom the execution of such power is committed, must concur in the act to be done, to make such execution valid and effectnal, unless it is otherwise provided by the parties. Such is the case with arbitrators, trustees, &c., appointed by the act of the parties interested. On the other hand, it is equally well settled, that where the powers entrusted are matters of *public concern*, then the voice of the majority shall govern, and their act is the act of the whole. Co. Lit., 181; *Grindley vs. Barker*, 1 Bos. & Pul., 236; *Green vs. Miller*, 6 J. R., 39; *Young vs. Buckingham*, 6 Ohio, 485.

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In *Gridley vs. Barker*, Eyre, C. J., says: "It is now pretty well established that where a number of persons are entrusted with power, *not of mere private confidence*, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." Our statutes, of 1849, chap. 4, subdivision 3 of sec. 1, seemed to go further and make the execution of a majority, when acting alone in cases where a *joint authority is given to three or more officers or other persons*, legal and binding, unless it shall be otherwise expressly declared in the law giving the authority.

2. The second point made is, that the assessment is void because the question of incurring the liability was not submitted to the voters of the city pursuant to the 4th section of the act above referred to. To make this objection intelligible, it is necessary to state briefly the provisions of the three preceding sections. The first section provided that the mayor and city council should not levy a tax on the city in any one year, for current city expenses, exceeding five thousand dollars. The second section, that the mayor and council should levy a tax in addition to the current city expenses, sufficient to pay the then indebtedness of the city, as the same should become due and payable, and also a tax on the several wards sufficient to pay their respective indebtedness. The third, that there should be no other tax levied upon said city, or the several wards thereof, for city or ward purposes, except the poll tax, unless specially authorized by a vote of the property tax payers, as thereinafter provided. The fourth section provided that, on the written petition of fifty freeholders of the city, asking for an appropriation, stating the amount, for any specified object, not coming within the current, ordinary expenses of the city, it should be the duty of the mayor and council to call a special election of the property tax payers of the city, to vote upon such appropriation; and

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if a majority of those voting on said question, should vote in favor of it, the city council should make the appropriation and levy the tax to pay it, but the money should be appropriated to no other purpose except that specified in the original petition of the freeholders; that no more than one such proposition should be submitted at any one election, and that any surplus money remaining over and above completing said specified object, should be carried to the credit of the fund for current city expenses, and should lessen the amount to be raised for that purpose in the next ensuing year to an amount equal to said surplus.

The case shows that before the city council authorized the erection of the piers, breakwater and protections described in the complaint, a petition therefor was signed by fifty freeholders, and presented to the council, but that no vote of the property tax payers was taken. We are of opinion that the making and presentation of the petition was wholly uncalled for, and that the provisions of section four were entirely inapplicable to such a proceeding. It is very evident, from the tenor of sections three and four, that their provisions are applicable to proceedings for levying taxes, above the sum of five thousand dollars, specified in the first section, for general city and ward purposes, and not to special assessments authorized by the 9th and 10 sections. Such general purposes would include the erection of public buildings for the accommodation of the inhabitants, such as a city hall, and market houses for the sale of provisions, the providing of the city with the necessary and usual implements for the extinguishment of fire, and other kindred objects, of general importance and necessity to the public. This is manifest from the last clause of the fourth section, which provides that after the specific object of these appropriations is obtained, the surplus, if any, should be carried to the credit of the fund for current city expenses, and lessen the amount of taxes to be raised for that

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purpose the ensuing year. This provision, if held applicable to a proceeding like the present, would be obviously oppressive and unjust as to those persons whose property is assessed to pay for the improvements. This view is corroborated by the provisions of the 11th section, which declared that whenever the assessment provided for in the 9th and 10th sections should be completed and filed with the city treasurer, the same should become a lien upon the lots, from the time of filing the same, and directed the manner of collection. These three sections, taken together, seem to form a complete system of proceeding, in reference to the subjects to which they relate.

3. The only remaining point deemed necessary to be noticed is, that the assessment is void, "because it is the appropriation of private property for public or private use, without compensation." That such an assessment is not an appropriation of private property for public use, within the provisions of our constitution, we think too well settled by adjudications in other states, upon like provisions, to admit of discussion. It is an exercise of the taxing power, and not an appropriation of specific private property for public use. The printed brief seems to indicate a doubt in the mind of the counsel whether the object to be attained was of a public or private nature. On the argument it was insisted that it was purely a private enterprise. It was upon this ground that the circuit judge sustained the action, and directed a decree perpetually restraining the collection of the taxes. If this position is correct, the whole proceeding must fall. The legislature are not authorized to provide for the levying of taxes for merely private or individual ends. Such taxation would be entirely subversive of the objects of government, and ought not to be tolerated. Legislative authority is not delegated for any such purpose, and the taxing power can only be exercised for the accomplishment of some object of public or com-

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mon interest. No authorities were cited to show that it was taxation for merely private purposes. If the legislature may by act authorize the common council of a city, at the public expense, to provide for the organization of fire departments, and supply them with proper engines and machinery, to prevent the destruction of buildings by fire, it is difficult to perceive why it may not, on the same principle, authorize the levy and collection of taxes, for the purpose of staying the destruction of the site of the city itself, when, from natural causes, such as a change in the current of a stream, or the action of the waters of a lake, it is in danger of being undermined or swept away. If the loss of buildings and perishable things be regarded as a public calamity, worthy and proper to be guarded against at the public expense, is not the loss of both buildings and the soil on which they stand, a greater calamity, and more worthy of public protection? There is hardly a city in the state in which there are not fire departments organized and supported, to a greater or less extent, at the expense of the public; yet we never heard it objected that they are mere private enterprizes, not authorized by law. The circuit judge, in his opinion, says: "The tax is levied for the protection of private property, and for an object in which the public have really no interest." If this be so, does not the argument apply with much more force to all public and statutory regulations for preventing accidents and losses of the former character? The objects of protection in that case are all private property. No city has perishable property of its own to warrant these expenditures. Many have none. The object is to defend and save private property. In the present case, however, in addition to the private injuries to be prevented, the public had a direct interest in the preservation of its streets and grounds. That private property may be either directly or indirectly protected, or private interests promoted by a given improvement, furnishes

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no sound rule for deciding that it is not public. Public and individual interests are often so intimately connected and blended together, that it is impossible to advance the one without at the same time advancing the other. There is no public good without at the same time a private benefit. They are inseperable; the former cannot exist without the latter. If the latter be not promoted, it proves that it is not a public good. That which affects the interests of an entire community must, to a greater or less degree, affect the interests of each member of it. To determine whether a matter is of public or merely private concern, we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community will be so. That such was the character of the improvements provided for by the act, there can be little doubt. The entire city was interested in staying the further progress of destruction caused by the action of the waters of the lake.

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

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LUMSDEN *vs.* CROSS.

APPEAL FROM COUNTY COURT, MILWAUKEE COUNTY.

Heard October 27, 1859.] [Decided January 4, 1860.

Assessments—Constitutional Law—Taxes.

The charter of the city of Milwaukee, which provides for assessing a special tax upon lots in the city to pay the expense of opening, grading, improving and paving the streets, and building sidewalks and cross walks in front of the same lots, is constitutional.

All taxes levied for the purpose of revenue, and for the support of the government, as well for the expenses of municipal corporations as for the state at large, must be levied in accordance with the uniform rule prescribed by sec. 1, Art. VIII, of the Constitution.

Taxes raised by the city of Milwaukee to pay the expense of opening, grading, paving, and improving the streets, and constructing suitable sidewalks and crosswalks, can, under the provisions of sec. 3, Art. XI, be assessed upon the lots in front of which the improvements is made, and not on the city at large.

The legislature has power to declare by law what shall be the effect of instruments made by public officers under sanction of law, such as tax lists, tax deeds, &c., when offered in evidence.

The cases of *Delaplaine vs. Cook*, 7 Wis., 44, and *Knowlton vs. Supervisors of Rock County*, 9 Id., 410, considered and approved.

This action was commenced by Samuel and William Lumsden against James B. Cross, to recover the amount they had paid to redeem a lot in the city of Milwaukee which the defendant had allowed to be sold for taxes which he was bound to pay. The complaint set forth that they owned the lot and had leased it to Winthrop W. Gilman for a term of years, and he had leased one half the lot to Cross, who agreed to pay and discharge all taxes and assessment levied and assessed on the premises during the term of his lease, at the time the same should become due and payable, and before costs or penalty should accrue thereon by reason of the nonpayment. That Gilman had assigned the lease to the plaintiffs. That Cross had not kept his contract and agreement, and did not pay the taxes and assessments, assessed and levied on the tract for the year 1855; that the lot had been sold

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for the taxes, and they had been put to the expense of redeeming it, amounting to $140 18.

To this complaint the defendant answered, that the plaintiffs had paid but $8 59, and for that he offered to allow judgment to be entered.

2. That the pretended taxes and assessment of the city of Milwaukee, assessed and levied for the year 1854, and for which the same were sold, were levied and assessed for grading, improving and repairing the streets, sidewalks or alleys adjoining or in front of the lands, and that all moneys in the complaint alleged to have been paid by the plaintiffs, except the sum of $8 59, were paid for said pretended taxes and assessments, and for redeeming the lands from the pretended sale therefor, and not otherwise.

3. That said pretended taxes and assessments of the city of Milwaukee were levied and assessed upon the lands illegally and without due course or authority of law, and in contravention of the charter of the city of Milwaukee, and in violation of the constitution of the state of Wisconsin in such case made and provided, and that the same were and are illegal and void, and of no effect.

On the trial the plaintiffs proved the levy and sale of the lot for the tax, and that they had redeemed it by paying $131 34. The county judge instructed the jury that assessments could be constitutionally and legally made on lots fronting on the streets of the city, to defray the expense of repairing or making the streets in front of such lots, and in substance, that the provisions of the charter of the city of Milwaukee, in relation to grading, making and repairing streets, in force in 1854, were constitutional and valid.

The jury found for the plaintiffs, and judgment was entered accordingly. From which Cross has appealed to this court.

Downer, La Due & Jenkins, for the appellant.

Nelson Cross, for the respondent.

The counsel on each side relied upon the same authorities as in the cases of *Weeks vs. City of Milwaukee*, and *Clark vs. City of Janesville, supra;* and to which reference must be had.

By the Court, Dixon, C. J. It has been already decided in the case of *Knowlton vs. The Supervisors of Rock County*, 9

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Wis., 410, that the uniform rule of taxation prescribed by the *first* section of the VIIIth Article of the constitution, extends to all taxes levied for the purpose of revenue, or the support of the government, whether the moneys were used in defraying the expenses of municipal corporations, such as towns, villages, cities and counties, or those of the state at large. We are now called upon to determine whether this constitutional rule of uniformity extends to what are denominated "assessments" made by the corporate authorities of the city of Milwaukee, under the charter, for the purpose of opening, grading, paving and improving streets within that city, and supplying them with suitable side and crosswalks. It was remarked in that case above referred to, that in the absence of any constitutional restrictions, legislative action upon the subject of taxation could seldom become a matter of judicial supervision or control. When it was said however that every wholly independent government has authority to lay taxes in its discretion, the remark, when applied to a constitutional or republican government, is of course to be understood with the qualification, that they are to be imposed to subserve the legitimate ends of taxation, viz: To defray public charges and expenses, and by general or public laws equally binding on every member of the community within or for which they are levied. There can be little doubt that these assessments or local impositions are public burthens or charges, and as such would be included within the general term taxation, and governed by the rule prescribed by the first section of the VIIIth Article, provided they are not withdrawn from the operation of that section by the 3d section of the XIth Article, which reads as follows: "It shall be the duty of the legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to *restrict* their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, *so as to prevent abuses in assessments* and taxa-

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tion, and in contracting debts by such municipal corporations." Upon no other principle than that such assessments are burdens and charges imposed by the legislative power, upon property to raise money for public purposes, and are therefore *taxation*, according to its well defined and legal acceptation, can they be sustained at all. The controversy, so far as objections to the plaintiff's recovery, growing out of the provisions of the constitution, are concerned, is therefore reduced to the simple question of the effect of the section last quoted, upon a case like the present.

The constitution of Ohio, in relation to the general rule of taxation, is in effect the same as our own. If there be any difference, it is the more stringent of the two. It provides, 2d section, XIIth Article, that "laws *shall* be passed taxing by a uniform rule, all moneys, &c., and also all real and personal property, according *to its true value* in money." In the case of the *City of Zanesville vs. Richards*, 5 Ohio St. Rep., 589, the supreme court held, that this section was applicable to, and furnished the governing principle for all laws levying taxes for general revenue, whether for state, county, township or corporation purposes. The 6th section of the XIIIth Article, is substantially the same as our section 3, Article II. It reads thus: "The general assembly shall provide for the organization of cities and incorporated villages by general laws; and *restrict* their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, *so as to prevent the abuse of such power*."

The case of *Hill vs. Higdon*, 5 Ohio State Rep., 243, cited by the respondents counsel, was like the present in every feature and circumstance, so far as the constitutional question was concerned. There the action was brought directly for the amount assessed upon Hill, for the regrading and paving of a street in the city of Cincinnati. The common council had, by an ordinance, directed the regrading and

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paving of that portion of the street upon which Hill's lot fronted, and that the expense should be paid by a tax on the adjoining lots in proportion to their frontage on the street, according to the provisions of an amendment of the charter, passed March 20th, 1850. Higdon did the work under a contract with the city, and Hill refusing to pay the amount assessed upon his lot, he brought suit against him. The main question in the case, to-wit, the constitutionality of the law, under the foregoing provisions of the constitution of that state, was raised by special demurrer to the declaration. The supreme court held the provisions of the charter, and the ordinance passed in pursuance of it, constitutional and valid. The reasoning of Chief Justice Ranney is so clear, forcible, and conclusive, and so directly applicable to the question under consideration, that I cannot forbear quoting it at some length, as a sound commentary upon the provisions of our own constitution. After adverting to the section of the constitution requiring the passage of laws taxing, by a uniform rule, all moneys, &c., and the decision of the court in the case of the *City of Zanesville vs. Richards*, holding that it applied to all taxation for revenue purposes, he says: "The general assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property, and in what proportion the burden shall be laid. A uniform rate per cent. must be levied upon *all* property subject to taxation, according to its true value in money; so that all may bear an equal burden. If laws of the character of those now under investigation are controlled by this section, it is evident they cannot be sustained. They do not impose the tax upon all the property of the city or village, nor is it apportioned according to the true value in money of the property upon which it is laid. As the mode prescribed in this section is sufficient to enable municipal corporations to raise a revenue for the accomplishment of all their legitimate purposes, had

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the constitution contained nothing further to evince the intention of its framers, it might be argued (and I think conclusively), that any other mode of levying taxes for any purpose, was necessarily excluded. But it does contain a further provision, which every sound rule of construction binds us to regard, and which seems utterly inconsistent with such a conclusion." He then quotes the 6th section of their 13th article, and says further: "It is very clearly our duty to give effect to the natural and obvious import of the language of this section. It relates to the organization of cities and villages, and imposes upon the general assembly, the very important duty of so restricting the powers, it was supposed, they would possess, as to prevent their abuse. Amongst these is the power of assessment. This power had for many years been in constant and active exercise in every part of the state, and was perfectly understood by every member of the convention. The popular as well as legal signification of the term, had always indicated those special and local impositions upon property, in the *immediate vicinity* of improved streets, which were necessary to pay for the improvement, and laid with reference to the special benefit which such property derived from the expenditure of the money. They had always differed widely from the ordinary levies made for the purposes of general revenue. To confound them now in giving a construction to the second section of the 12th Article, is to make not only unmeaning, but utterly absurd, a material part of the 6th section of the 13th Article. To *restrict*, or regulate the exercise of a power, furnishes the strongest possible implication of its existence; and to impose upon the general assembly the duty to do this, in respect to a power which did not exist, or which had been expressly prohibited, would be nothing better than nonsense.

"It is our duty to give such a construction to the constitution as will make it consistent with itself, and will

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harmonize and give effect to all its various provisions. To do this, we have only to suppose that the convention used language with reference to its popular and received signification; and applied it as it had been practically applied for a long series of years. That where taxation is spoken of in the second section of the twelfth Article, reference is made to the general burdens imposed for the purpose of supporting the government, and the revenue raised expended for the equal benefit of the public at large; while the power of *assessment* referred to in the sixth section of the thirteenth Article, although resting upon the taxing power, was intended to describe a distinct and well known mode of levying a local burden upon particular property, with reference to the *peculiar* and *specific* benefit derived to such property, from the expenditure of the money. The general language of the first of these sections is thus only so far restricted as to give effect to the specified provision contained in the last. By the first, as the money is raised and expended for the equal benefit of all, no discretion is left with the general assembly; but the tax must be levied equally upon all property, according to its true value. But in the exercise of the power of assessment, legislative discretion, in apportioning the burden according to the benefits, is left as broad and unfettered as under the constitution of 1802. The last of these sections contemplates a delegation of the power to municipal corporations, and imposes upon the legislature the *duty* (as yet very imperfectly performed), of so restricting its exercise as to prevent abuse. A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction."

To these remarks, which seem to us so applicable to, and conclusive upon the point under consideration, I deem it unnecessary to add one word of my own. In our opinion the provisions of the charter authorizing such assessments, are

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no infringement of the constitution. It may be, as was claimed in argument by the appellant's counsel, that the citizens and owners of property in Milwaukee have suffered great wrong, and that much mischief has been caused by the improper exercise of this power on the part of the municipal authorities. If this be so, it is attributable, firstly, to the failure of the legislature to perform the duty solemnly imposed upon them by the constitution, to *restrict* its exercise by the city authorities so as to prevent abuses, and secondly, to a want of proper care and caution in its exercise by the authorities. The remedy lies in part with both, but the action, or want of action on the part of either, is beyond the reach or control of this court.

The power of the legislature to declare the effect of instruments made by public officers under the sanction of law, such as the *tax list* of the city of Milwaukee, when offered in evidence in a court of justice, has been already determined by this court in the case of *Delaplaine vs. Cook*, 7 Wis., 44. It was there decided that they could do so. The objection that a fractional part of a lot cannot be assessed and sold, seems wholly untenable. We can see no good reason for it. None is offered.

The point that the verdict exceeds the amount of money paid by the plaintiffs to redeem the lot, and the interest from the time of payment, cannot be made here. No motion for a new trial on that account was made in the court below, and hence no review of the *facts* can be had here.

The judgment of the county court is affirmed with costs.

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CAHOON *vs.* WIS. CENTRAL R. R. CO., et al.

APPEAL FROM CIRCUIT COURT, WALWORTH COUNTY.

Heard October 14, 1859.] [Decided January 4, 1860.

Frivolousness—Judgment—Assessment—Answer—Indorser.

Where judgment has been ordered on motion for the frivolousness of a demurrer, no assessment by the clerk of the amount due is necessary, if the complaint be verified.

So where judgment has been ordered on motion for the frivolousness of a demurrer, no affidavit of want of answer is required. Such a judgment is not founded on the want of an answer, but upon an issue of law found for the prevailing party.

Whether a party who writes his name on the back of a promissory note before delivery, is liable to the payee as indorser, is not so well settled, that a demurrer to a complaint showing such a state of facts, will be deemed frivolous.

To constitute a pleading frivolous, it must be apparent on a mere inspection, without examination or research, that it is utterly invalid.

The cases of *Farmers' and Millers' Bank vs. Sawyer*, 7 Wis., 379; *Van Slyke vs Carpenter*, id., 179; *Martin vs. Weil*, 8 id., 220, considered and approved.

This was an action commenced by William Cahoon, against the Wisconsin Central Railroad Company, as maker, and James Haskins and John S. Partridge, as indorsers, of the following promissory note:

"OFFICE OF THE WISCONSIN CENTRAL RAILROAD COMPANY,
Elkhorn, June 9th, 1857.

"$275. Six months after date, the Wisconsin Central Railroad Company promise to pay Wm. Cahoon or bearer, two hundred and seventy-five dollars, for value received, with interest, at 10 per cent. per annum, until due, and after maturity, 12 per cent.

JOHN S. PARTRIDGE, Vice President.

"Attest, EDWIN HODGES."

The complaint alleged the corporate existence of the company, and the authority of Partridge to make the note; also the indebtedness of the company to the plaintiff; and that the other defendants signed the note on the day of its making,

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and before delivery; and the same was duly presented for payment, &c., and notice given to the indorsers. To this complaint the defendants demurred generally. The other facts in the case are stated in the opinion of the court.

John E. Holmes, for the appellants.

We claim that judgment was irregularly entered in this action, on account of non-compliance with section 158 of Code, as directed by section 179, upon the trial of an issue of law. In that there was no notice of assessment by the Clerk. Code, § 158; *Cook vs. Pomeroy*, 10 How., Pr. R., 103 *King vs. Stafford*, 10 id., 30; *Auyr vs. Chase*, 1st Code, Rep. N. S., 151.

The complaint states that the defendants, Haskins and Partridge, before the note was delivered to the plaintiff, in order to give currency to the note, and to induce the plaintiff to accept the same, severally endorsed it, by writing their names upon the back. In this statement the plaintiff alleges nothing more than that the defendants, Haskins and Partridge, undertook to answer for the default of payment by the company; and admitting all there stated to be true, the promise implied on the part of these defendants is void, under the statute of frauds. Rev. Stat., chap. 107, § 2; *Taylor et al. vs. Pratt*, 3 Wis., 674.

Cary & Pratt, for the respondent.

By the Court, Paine, J. This action was on a promissory note, executed by the R. R. Co., and indorsed by the other defendants. Separate demurrers were filed by the company, and the indorsers, which, on motion, were adjudged frivolous, and judgment entered for the plaintiff. From this judgment all the defendants appealed.

It is claimed, in the first place, that notice of assessment by the clerk should have been given. We deem this clearly unnecessary, as no assessment was necessary. The complaint was verified, and section 158 of the code only requires an assessment by the clerk, when the complaint is not verified; and this view is fully sustained by the authorities cited in

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support of the objection. *Cook vs. Pomeroy*, 10 How., Pr. 103.

It is also urged that an affidavit should have been filed that no answer had been received. But this cannot be required. It is true that section 179 provides that on a judgment for the plaintiff, on an issue of law, he may proceed as prescribed by the first two subdivisions of section 158, on failure to answer. But this can only mean that he is to proceed under section 158 so far as that can be applied consistently with the reasons that entitled him to judgment. Where the whole proceeding is under that section, it is the failure to answer that entitles him to judgment, and of course he must prove a failure to answer; but where he is entitled to it, on an issue of law found in his favor, under section 179, then a failure to answer is not the reason that he is entitled to judgment, and he cannot be required to prove it. If this was held requisite, the party whose demurrer had been adjudged frivolous, might immediately serve an answer, and thus deprive the plaintiff of his judgment.

We think the demurrer of the R. R. Co. is clearly frivolous, but the majority of the court think that of the indorsers not so. The note was payable to the plaintiff or bearer, and had never been transferred; and there is much in the books to suggest a doubt whether they can be considered as indorsers, in the strict sense and meaning of the term; an indorsement generally importing a transfer of the instrument. There are many decisions that would hold them as makers, or guarantors. But this doctrine has been much questioned, of late; and the precise effect of an indorsement of this kind does not seem to be so clearly settled as to bring this demurrer within the rule as to frivolousness. In *Dean vs. Hall*, 17 Wend., 222–3, the court, under just such an indorsement as this, held the parties liable as indorsers; but there the note had been negotiated by the payee, and the court expressly state, that if the action had been brought by the payee, with-

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out any transfer, it would present a question of some difficulty. It may appear upon examination, that these parties are very clearly liable as indorsers. We only say now, that it is not so clear as to come within the decisions of this court as to frivolousness, which are, that it must be apparent on a mere inspection, without examination or research, that the pleading is utterly invalid. *Farmers' and Millers' Bank vs. Sawyer*, 7 Wis., 379; *Van Slyke vs. Carpenter*, id., 179; *Martin vs. Weil*, 8 id., 220.

The judgment, as against the Railroad Company, is affirmed, with costs; as against the other appellants, it is reversed, with costs, and the cause remanded.

BLAIKIE *vs.* GRISWOLD et al.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard October 13, 1859.] [Decided January 4, 1860.

Practice—Warrant of Attorney—Judgment—Complaint—Court Commission.

Where a party has a negotiable promissory note and warrant of attorney on which he enters judgment, and describes himself as the assignee of the payees, such description may be regarded as merely *descriptio personæ*, and does not vitiate the declaration.

A party having a promissory note and warrant of attorney, may file a declaration in common counts, with a copy of the note, and such declaration will be treated as a complaint under the code.

An affidavit made by the attorney of the party, which states that he is the attorney, &c., and also the amount actually due on the note upon which he is entering judgment by cognovit, is sufficient to sustain the judgment; without stating that he makes the affidavit on behalf of the plaintiff in the action.

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Where a judgment is entered upon a warrant of attorney for a less sum than is actually due, the defendant cannot assign that cause as error in the judgment.

A judgment by cognovit may be entered in the circuit court without leave of the court, within a year of the date of the warrant of attorney, in vacation. And the record of the judgment may be signed by a court commissioner.

Courts have a general discretionary control over judgments entered upon a warrant of attorney, and can protect the defendant from any imposition or fraud which may intervene.

Andrew Blaikie filed his declaration, describing himself as the assignee of James A. Smith and Charles B. Smith, against Harry Griswold and Franklin J. Burcham, as partners, &c., in the common money counts, to which was appended a notice in the usual form, that the claim was founded upon two promissory notes, each for $2,317,50, dated January 23, 1858, payable to the Smiths, in 90 days from date, on one of which was indorsed $719,03. There was a power of attorney to confess judgment, dated the same day, which was also filed. The attorney for Blaikie made the following affidavit:

"Peyton R. Morgan, being duly sworn, deposes and says, that he is one of the attorneys for the plaintiff in this action; that there is actually due to the plaintiff, as such assignee, on the promissory notes hereto annexed, the sum of four thousand two hundred and ninety-eight dollars and sixty-nine cents.

PEYTON R. MORGAN."

Subscribed and sworn, &c.

A plea of confession in the usual form was also filed, and judgment was signed by L. B. S. Miller, court commissioner, on the 4th of Jan., 1859, for $4298,69 damages, and $18,64 costs. On the 18th of April, 1859, the defendants moved the circuit court to vacate the judgment: 1. Because no valid judgment had been entered in the action: 2. Because the plaintiff did not file a complaint in the action: and 3d. Because the proceedings in the action are illegal, irregular, and void. This motion was accompanied with an affidavit of the defendants; which confessed the making of the notes, and warrant of attorney; that afterwards they had bought $2000 worth of goods of the Smiths, and had paid $2800 to apply on the judgment notes, and there was due the Smith's, on the 4th of January, $4,444,02; on which this judgment

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was entered, and execution sued out and levied on their goods, &c. That afterwards they had paid $1000 to be applied on the judgment; and that on the 19th of February they had made an assignment in favor of creditors, and deny that they had ever authorized any person to enter the cognovit for them.

On the 19th of April, 1859, the circuit judge granted the motion, and set aside the judgment; from which order the plaintiff appealed to this court.

H. T. Sanders, for the defendants.

The judgment entered in the court below on the bond and warrant of attorney, was erroneous, because, 1. The complaint should, by some appropriate averment, show that the action was instituted by the plaintiff in his representative character as assignee. R. S. 721, § 3; id. 714, § 12; *Russell vs. Clapp*, 7 Barb., 482; *Parker vs. Totten*, 10 How. Pr., 233; 17 Wend., 197; Voor. Code, 126–7; Van Sand. Pl., 172.

2. The plaintiff filed a *narratur* containing the common counts, and did not file a complaint as required by law. R. St., chap. 140, § § 12, 15; chap. 125, § § 1, 2, 3, 10. The forms of pleading heretofore existing is abolished. R. Stat., 721, § 1; 1 Abb. Pr., 348; 12 Howard, 156.

The legislature, in terms, prohibited the entry of judgment upon bond, or note and warrant of attorney, as provided by law before the passage of code, by repealing sec. 329, p. 109 of the code of 1856, and the passage of sec. 12 to 15 inclusive, Rev. Stat. chap. 140.

3. The affidavit of indebtedness is not in conformity with sec. 14, chap. 140, Rev. Stat.; it does not appear that the affidavit is made for, and on behalf of the plaintiffs. Rev. Stat. 723, § 18, 19.

4. The power to confess judgment is only for the amount due upon the notes, to be ascertained by computation. The amount due on notes January 4th, 1859, was $4,444 02. Judgment was entered for $4,298 69; showing that there were equities which the attorney attempted to adjust, thereby violating his authority. He cannot adjust equities, or strike a balance. *Dilley vs. Van Wie*, 6 Wis., 209.

5. The signing and rendering of a judgment is the exercise of a judicial power, which cannot be vested in a court commissioner. Con., Art. 7, § 2; *Conroe vs. Bull*, 7 Wis., 408.

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A judgment is the final determination of the rights of the parties to the action. Rev. Stat., p. 756, § 257. Judgment upon confession shall, in the first instance, be entered, upon the direction of a circuit judge. Rev. Stat., 758, § 25. The signing of a judgment, as provided for by section 15, chapter 140, Rev. Stat., is a ministerial, and not a judicial act.

6. Judgment by confession, drawn by the plaintiff, when the defendant has no adviser, must be carefully watched by the court, that they be not used to oppress unwary defendants. 11 How., 456; 6 Wis., 209.

7. It appears by the affidavits of Griswold & Burcham, that after the rendition of the judgment, the rights of creditors intervened, by virtue of the assignment; as against them the judgment is fraudulent and void. 17 N. Y. Rep., 9; 2 Kern., 215; 16 J. C. R., 320, 329; Abb., 503 to 516; 10 How., 494; id., 231; Vooh. Code, 516, note and cases cited; 1 Abb., 354.

Wording & Morgan, and Matt. H. Carpenter, for appellant, relied on chap. 140, §§ 12, 13, 14, and 15, R. S., to sustain the judgment, and insisted that chap. 125, § 3, had nothing to do with it.

2. The phrase "assignee," &c., in the complaint, was merely *descriptio personæ*, and may be rejected, as surplusage. *Sheldon vs. Hoy*, 11 How., Pr. 15; *Merritt vs. Seaman*, 2 Seld., 168.

3. The answer and affidavit is in strict conformity with the requisitions of the statutes, chap. 140, § 14.

4. After answer or *verdict*, and by parity of reasoning, after *judgment*, the court will support the complaint by every legal intendment, if there is nothing material on record to prevent it. *Addington vs. Allen*, 11 Wend., 375; *Carrol vs. Peake*, 1 Peters, 18; *Stimpson vs. Gilchrist*, 1 Green., 202; *Ayers vs. Covill*, 18 Barb., 260; *Slack vs. Lyon et al.*, 9 Pick., 62; *Anderson vs. Read*, 2 Overt., 205; *Brown, Administratrix, vs. Harmon et al.*, 21 Barb., 508; *Associates of the Jersey Company vs. Halsey*, 2 South., 750.

5. The warrant of attorney to confess judgment authorized a release of all errors, and the signers of the same can take no advantage of the acts of their attorney in waiving defects in pleading. *Portage Canal Manufacturing Co. vs. Crittenden*, 17 Ohio, 436.

6. The courts having a general discretionary power over judgments entered by confession on bond or note and warrant of attorney, in cases free from fraud or imposition, and espe-

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cially when the rights of intervening judgment creditors are not prejudiced, should allow all proper amendments for the furtherance of justice, or disregard such defects when the substantial rights of the adverse party are not affected. Rev. Stat., §§ 37 and 40, chap. 125; *Davis vs. Morris et al.*, 21 Barb., 152; *Johnson vs. Fellerman*, 13 How., 21; *Lawless vs. Hackett*, 16 John., 149.

7. Judgments by confession may be valid as to parties, though void as to judgment creditors. *Chappell vs. Chappel*, 2d Kern., 215; *Stebbins vs. East Society of the Methodist Episcopal Church, Rochester*, 12 How., 410; *Beekman, Admr. of William Barthrop, vs. Kirk*, 15 How., 228; *Seaving & Mead vs. Brinkerhoff*, 5 J. Ch. R., 329.

8. Defendants in judgment must resort to their writ of error, or appeal, for the correction of irregularities or errors in the pleadings or proceedings. *King vs. Shaw*, 3 John., 142; *Wyman vs. Campbell*, 6 Port., 218.

9. The particular grounds of the motion to vacate the judgment should appear in the notice of the motion, or the affidavit on which it is founded. *Whitehouse vs. Pearce et al.*, 9 How., 35; *Ellis vs. Jones, Sheriff, &c.*, 6 How., 296; Rule 22 Circuit Court.

By the Court, PAINE, J. We do not discover upon this record any good ground for setting aside the judgment. The judgment was entered upon a warrant of attorney, given by the respondents for the amount due upon a promissory note, and the proceedings appear to be in strict conformity to section 12, chap. 140, R. S., 1859, and the subsequent sections in that chapter. In the commencement of the complaint, the plaintiff describes himself as assignee of James A. Smith and Charles B. Smith; and it is objected that the complaint should, by some appropriate averment, show that the action was instituted by him in his representative character, as assignee. The plaintiff had possession of the note, which was negotiable, and endorsed by the payees; and we think the mode of describing himself may be regarded merely as

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descriptio personæ. 1 Chitty's Pl., 151, 2; *Merritt vs. Seaman*, 2 Seld., 168.

Further, it is insisted that the plaintiff did not file a complaint, according to the requirements of the code. The complaint was the old declaration, upon the common counts, with notice that two promissory notes, copies of which were given, constituted the cause of action. This is perhaps not technically such a complaint as is required by the code, but it is a matter of form, rather than substance, and does not affect the substantial rights of the parties. We therefore think it should be disregarded, after judgment. § 40, chap. 125, R. S., 1859.

But again it is said that the affidavit of indebtedness is not in conformity to section 14, chap. 140, R. S., because it does not state that it was made for and on behalf of the plaintiff in the action. The affidavit, it appears, was made by Peyton R. Morgan, who deposed, in substance, that he was one of the attorneys for the plaintiff in the action, and that there was actually due the plaintiff, upon the promissory notes annexed to the complaint, the sum of four thousand two hundred and ninety-eight dollars and sixty-nine cents. Although the attorney does not state, in so many words, that he makes the affidavit on behalf of the plaintiff, yet he swears that he is one of the plaintiff's attorneys in the action, and this fact discloses his means of information as to the precise amount due upon the notes, and also sufficiently shows his connection with the suit, and authority to make the affidavit. We consider the affidavit made to be substantially in conformity to the statute.

It was further objected, that the warrant of attorney only authorized a confession of judgment for the precise amount due upon the notes, while by computation it appears that judgment was confessed for less than the real amount due. We do not think that this is an error of which the respond-

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ents have any right to complain. If the plaintiff chooses to take judgment for less than he is entitled to, the respondents are in no wise prejudiced by it. It is not analogous in principle to the case of *Dilley vs. Van Wie et al.*, 6 Wis., 209, cited upon the brief of counsel.

A still further objection has been taken to this judgment, which is, that it was entered in vacation, and although authorized by the statute, is yet void, under the constitution of this state. The argument in brief is this: that the rendition of a judgment involves the exercise of judicial power which can only be performed in this state by a court in term. There is nothing upon this record which shows that this judgment was not entered in court, except, perhaps, the circumstance that the judgment is signed by a court commissioner; and therefore it is sufficient to say, that this question, as to whether the legislature cannot provide for the entering of judgments upon warrants of attorney in vacation, does not fairly arise in the case. This question, which confessedly is one of considerable practical importance, has been raised and discussed in other causes argued at this term, and an opinion will be given distinctly upon the point, in which the validity of these judgments will be sustained. *Wells vs. Martin, post.*

Having concurred in the correctness of the decision which upholds these judgments, it may be permissible for me to state, in answer to the argument made upon the opposite side, in this case, one or two reasons which led my mind to the conclusion, that it was competent for the legislature to provide for the entering of judgments upon warrants of attorney in vacation. Nothing like a general discussion of the question is proposed. The judicial power being vested in certain courts, by the constitution, it is claimed, that the legislature cannot authorize the rendition of a judgment without the intervention of those courts. A judgment is defined to be the decision or sentence of the law, given by a court of justice, as

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the result of proceedings instituted for the redress of injury. 11 Peterdorf's Ab., 640, title, judgment; 3 Black. Com., 395 and 396. By section 25, chap. 132, R. S., 1859, it is defined to be the final determination of the rights of the parties to the action. This determination implies the sentence of the law pronounced and declared by the court upon questions raised in the suit.

There are various kinds of judgments; as where the facts are admitted by the parties, but the law disputed; where the law is admitted but the facts disputed; where both the facts and law are admitted, as well as other judgments well known to the profession. In the case where both the law and facts are admitted by the parties, as they are upon a judgment by confession, there is no occasion for the exercise of the judicial faculty, and the entering of the judgment becomes a clerical or ministerial act. True, the language of the judgment may be in the case, "*consideratum est per curiam*," but still, if this form means anything, it is only that by the sentence of the law the plaintiff is entitled to recover. And when there is judgment on confession or by default, there is, properly speaking, no exercise of the judicial faculty, no consideration by the court.

But if this reasoning is considered too refined and nice to meet the objection, another answer may be given to the argument. The practice of entering up judgments in vacation was well established in England, and in many of the states, at the time of the adoption of the constitution. Within a year and a day from the date of the warrant of attorney, judgment might be entered according to its terms as of *course*, without leave of the court, either in vacation or term, 2 Arch. Pr., 23: "And if either party die in vacation, within a year after giving the warrant of attorney, judgment may be entered up, of course, at any time after, in that vacation; and it will be a good judgment at common law, as of the preceding term,

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though it be not so upon the statute of frauds in respect of purchasers, but from the signing." 1 Tidd., 551. Leave to enter up judgment on warrant of attorney, after the year and a day, was obtained by a motion in term or by order of a judge in vacation, 2 Chitty's Gen. Pr., 335; 3 id., 669.

Substantially the same practice prevailed in New York, where it is held, that within a year and a day from the date of the warrant of attorney, judgment may be entered without obtaining any order for that purpose; but that after that period has elapsed, there must be an order either by the court or a judge at chambers. 5 Hill, 497. This practice of entering up judgments in vacation, on warrant of attorney, was well understood by the framers of the constitution, and we do not think they intended to change or abolish the practice by any provision of the constitution. We have seen that whenever an order is necessary for entering up judgment on a warrant of attorney, such order may be granted by a judge at chambers within ten years from the date of the warrant. The granting of this order was an ordinary duty of the judge at chambers.

Section 23, Article VII, of the constitution, reads as follows: "The legislature may provide for the appointment of one or more persons in each organized county, and may vest in such person such judicial powers as shall be prescribed by law: provided, that such power shall not exceed that of a circuit judge of chambers." From this provision it is apparent that the framers of the constitution, by vesting the judicial power of the state in certain courts, could not have intended by this section, to restrict or deprive a circuit judge of any power which he might exercise at chambers at common law, or to inhibit the legislature from conferring this same power upon court commissioners. And the legislature having provided that judgments on warrants of attorney might be entered without action when the judgment is signed by a judge or court commissioner, and the other provisions of the statute

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are complied with; I can perceive no constitutional objection to the practice.

It is clear, that if the position be sound, that a judgment, by the force of the term, implies, in all cases, deliberation and consideration by a court, and is always an act of the judicial mind applied to the law and facts in question, there can be no such thing as a judgment entered in vacation anywhere. For the proposition assumes that a *court* alone is competent to render a judgment, and if so, then no judgment entered in vacation is valid, since it is no judgment. Now, whether by legal relations and legal fictions, or by any other process of reasoning, judgments entered on a warrant of attorney in vacation, can be supported, quite certain it is, that they have been considered good and valid judgments, when no other objection to them existed, and where the practice of entering them in vacation has obtained.

In some of the states, neither the statutes, or rules of court, provide for the entering of judgments by confession in vacation. The legislature of this state has seen fit to adopt the practice, and I think it was competent for it to do so. Courts have a general discretionary control over judgments entered upon warrant of attorney, and can protect the defendant from any imposition or fraud which may intervene. It does not appear that there was any error in entering the judgment in this cause, and we therefore think that the circuit court improperly set it aside.

The order of the circuit court, setting aside the judgment, is reversed.

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NASH *vs.* CHURCH et al.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 10, 1859.] [Decided January 4, 1860.

Partition—Estoppel.

Upon a complaint for partition against certain persons named, and others as unknown owners, and publication of notice pursuant to the statute, a person in possession claiming to hold a part of the land in severalty, and by a title paramount to that of the parties actually named in the proceedings, and who was not named as a party, and had no actual notice of the commencement or pendency of the proceedings, is concluded by the judgment, "as an unknown owner," there being no evidence of fraud or collusion in the commencement of the action, or procuring of the judgment; and his title is bound thereby.

This was an action commenced by Charles D. Nash against Benjamin Church as owner, and Frederick Buchmann as tenant, for the recovery of lot 7 in block 30, in the sixth ward of the city of Milwaukee. The defendants denied the title of the plaintiff and claimed title in themselves. On the trial the plaintiff read the patent from the government for the quarter section in which the lot lay, and then relied on the record of an action for partition of the quarter section, in the circuit court of Milwaukee county. This bill for partition was filed August 19th, 1850, by Wilder Pierce and Ichabod Smith, as complainants, against Hans Crocker, Richard G. Owens, Harman Haertel, Philo White, William R. Thompson, John Calhoun, Hugh T. Dickey, John B. Baeubien, Theodore W. Parker, Edwin A. Norton, Joseph C. Orr, Francis C. Sherman, Charles B. Tatham, Edwin A. Norton, Lewis F. Jamieson, E. Rossman, John T. Allen, and Christopher S. Hubbard, and the unknown owners of the quarter section, as defendants.

The bill alleged that the complainants were seized in fee simple of an undivided interest of 19:87 acres in the quarter, as tenants in common with the defendants, or such of them as have an interest in it, as is hereinafter shown; that the quarter section, except a reserved acre, contained 159 acres.

That by the records of Milwaukee county, the defendants had interests as set forth in the bill, amounting in all to about

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155 acres. The following is the only allegation in the bill relating to unknown owners or their interests:

"And your orators further show that they are informed and believe, that divers of said defendants have, by deeds, respectively, conveyed portions of their interests to persons unknown to your orators; and that in setting forth the interests of the defendants, they have been guided by information received from the records in the office of the register of deeds of Milwaukee county. And your orators further show, that such portions of the tract as do not belong to the defendants, and to your orators, belong to unknown owners."

The bill also sets forth that about the 16th day of June, 1836, the defendant, Sherman, and one C. Beers, then owning or pretending to own, a large interest in the premises, plotted the same into lots and blocks, under the name of Sherman's Addition to Milwaukee, which plat was duly received for record on the 20th day of July, in the office of the register of deeds for Milwaukee county. That a verbal partition was made among several owners of interests, according to this plat, for convenience in paying taxes, and that many conveyances of specific lots were made according to such plat and partition, but the partition was not legally authorized or binding at law. The complainants pray the court in ordering partition, to direct that, as far as practicable, the verbal partition might be confirmed, and acts and conveyances of specific lots, according to the partition, might be made good.

The lot in question in this suit was not mentioned in the verbal partition.

On the 7th of December, 1850, an order was made for publication to bring in the unknown owners; which was duly published. On the 3d of May, 1851, Tatham answered, setting forth the amounts and particular lots he was entitled to by the verbal partition.

On the 10th of May the abstract of title was filed; and Crocker, Norton, Haertel and Beaubien answered. At the same time an order was entered defaulting Calhoun and the unknown owners, for having neglected to appear in the action. Also an order referring it to a referee to inquire and report whether the premises were so situated that a partition thereof could be made without prejudice, &c., who reported that it could be divided. And final decree was entered the same day, which set forth, "That the rights, titles and interests of the parties, complainants and defendants, in and to the prem-

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ises whereof partition is sought, are as follows, to wit: Ichabod Smith has undivided 9.937½; Wilder Pierce has undivided 9.937½; Hugh T. Dickey has undivided 8.200; Hans Crocker has undivided 2.50; Joseph C. Orr has undivided 5.00; Charles B. Tatham has undivided 27.00; Thomas L. Ogden has undivided 42.425, and unknown owners have undivided 4.00 acres. That the interest of Ogden was acquired as follows: From Edwin A. Norton 29.933; from Theodore W. Parker 2.867; from Charles B. Tatham 9.625 acres, pending the suit for partition. "That the said premises" be "divided into lots and blocks, and a plat thereof be made, corresponding with the illegal plat heretofore made thereof, and referred to in the said bill, as nearly as may be, consistently with making the streets, running through the said premises in a northerly and southerly direction, to connect with and conform to the corresponding streets in the second ward of the city of Milwaukee, and corresponding with any streets which are now legally established over the said premises." Also, that partition be made according to the several interests of the parties as so ascertained. That the voluntary verbal partition referred to in the pleadings, so far as the same has been ascertained, be made the basis of the partition, so far as it is a fair partition according to the rights of the parties, and considering the present value of the several lots."

On the 3st day of May, 1851, the oath and report of the commissioners for partition were filed. The report was accompanied by a plat of Sherman's Addition, made under the direction of the commissioners. The commissioners reported, among other things, that they allotted and set apart lot 7, block 30, in said Sherman's Addition, as designated upon the plat accompanying their report, among other lots, to Thomas L. Ogden; also that they allotted certain specified lots to unknown owners, as and for their interest of four acres in the said 159 acres.

The court, on the 31st day of May, 1851, made a final order or decree confirming the report of the commissioners, and thereby, among other things, "ordered, adjudged and decreed that the said partition, so made by the said commissioners, of all the said land and real estate, be firm and effectual forever." And that said lot 7, in block 30, and other lots allotted and set apart unto Thomas L. Ogden, as and for his part and portion of such premises as designated on the plat annexed to the report of the commissioners," "with the appurtenances,

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shall be and hereby are vested in him, the said Thomas L. Ogden, in severalty, to be had, held and enjoyed, by the said Thomas L. Ogden, his heirs and assigns forever."

The plaintiff then read deeds from Ogden to himself, and those through whom he claimed.

The counsel for the defendant then offered in evidence the record of a deed of 29.933 acres undivided, in said quarter section, dated Feb. 2, 1850, executed by Edwin A. Norton and wife, to Thomas L. Ogden. To the admission whereof in evidence, the counsel for the plaintiff objected. 1. Because the record and decree in the partition suit, is conclusive as to the title of the plaintiff and all other persons, and the defendants can only be permitted to show title under and subsequent to the partition. 2. Because there was no legal partition of the quarter of section, until the partition made by the decree now in evidence, and, therefore, any conveyance to the defendants, prior to this partition was simply void. The court sustained the objections and ruled out the evidence offered.

The counsel for the defendants again offered the deed from Norton to Ogden in evidence, to be followed by other deeds of conveyance, tracing the title of Thomas L. Ogden back to its original source, and showing that the title and interest of Ogden at the time of the partition, was expressly subject to the right and title of the defendants and their immediate grantors, and that at the time of the said partition suit and decree, between Smith and Pierce complainants, and Hans Crocker and others, defendants, neither Ogden nor any other party named in the record, had any interest or title whatever in or to the lot to recover which this suit is brought. The counsel of the plaintiff objected to this evidence on the same grounds alleged in his objection to the last preceding offer. The court sustained the objections.

The counsel for the defendant again offered the deed from Norton and wife to Ogden in evidence, and offered to accompany the same with proof, showing that at the time the partition, of which the record is in evidence, was made, the defendant, Church, or his grantee, was, and for several years prior to the commencement of the partition suit, had been in the exclusive, actual, and notorious possession and occupation of the lot in question in this suit, claiming to be sole owner thereof in fee and in severalty, and claiming the legal title thereto. To which evidence so offered, the counsel for

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the plaintiff objected, for the same reasons assigned in his objections to the two last preceding offers. The court sustained the objections.

The counsel for the defendants then offered in evidence the certificate of entry of the quarter section, at the United States Land Office, by Daniel W. Patterson, and to follow the same up with a chain of conveyances tending to show, as the defendants claimed, that the absolute legal title to the lot in question, was in the defendant Church before the commencement of the partition suit, and that the defendant Church, or his grantee, claiming under him, was in possession of the lot, occupying and claiming the same as his sole property before, and at the time of the partition suit. The counsel for the plaintiff objected to this evidence on the same grounds alleged for objecting to the three last preceding offers by the defendants. The court sustained the objections, and ruled and decided that such evidence as the defendant's counsel offered and proposed to introduce and present to the jury, was inadmissible and incompetent, and that the partition record, and decree, is, of itself, binding and conclusive evidence of title, as against the defendants herein, and as against all other persons.

The verdict of the jury and judgment were for the plaintiff. And from which this appeal is taken by the defendants.

Palmer & Stark for the appellants.

1. The court erred in admitting the record and decree in partition as evidence of title without proof, *aliunde* of title in the person to whom the lot in question was allotted in the partition. We claim that the only parties bound in any way by this partition record, are the persons named as parties and served with process, and their privies. That the court acquired no jurisdiction over unknowr owners, and the decree is void as to them; because, the statute under which the partition was conducted provides that, "in case one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the complainant," &c., "*so that such parties cannot be named, the same shall be set forth in the bill.*" The only allegation in the bill for partition on this point is this. "And your orators further show that such *portions* of said tract as do not belong to said defendants, and to your orators, belong to unknown owners." This allegation is entirely insufficient. 6 Paige, 492; *Hale vs. Chandler*, 3 Mich., 531.

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2. The court erred in ruling that this partition record and decree were conclusive evidence of title, and in refusing to permit the defendants below to show, in defense to the action, absolute legal title in Church, in fee, and severalty, and actual and uninterrupted occupation and use of the lot in question by the defendant Church, as sole and exclusive owner of the entire lot, from a time many years before, till long after the partition in defense to the plaintiffs' action. 1. Because the proceedings against unknown owners in this partition were irregular and void. 2. Because the defendants are not included within the description of unknown owners, as intended by the act in view of the nature of the interest and title they held at the time of the partition. 3. Because, under sec. 31, they are not "parties interested in the premises, who were unknown, and to whom notice was given by publishing the same, as in the chapter before directed," and are, therefore, not as such bound by the decree, and precluded from insisting on their legal title to the lot.

The second and third propositions will clearly appear from an analysis of chapter 108 of the R. S. (The counsel here cited and examined the various provisions of the statute.)

From this analysis of a large portion of the chapter, it seems to us plain, that the terms "parties interested," "persons interested," "parties," or "persons having an interest," "persons appearing to be interested," &c., are all convertible terms, describing the same interests and persons; and the first section furnishes the definition of them all. The only proper parties to a bill for partition, were persons holding or claiming lands "as joint tenants, or tenants in coparceny or common." A person holding the whole or any part of the premises claiming adversely, and excluding all others from the possession of the portion claimed by him in severalty, could not be a proper party to a partition suit. If he were, then plaintiffs not in possession might bring a suit in partition in lieu of an action of ejectment, for the purpose of determining conflicting and adverse claims to real property. It is submitted that no such authority exists under this chapter.

"Parties" or "persons interested" in the premises, mean those interested as "joint tenants, or tenants in coparceny or common," and therefore proper parties, if named, and their interests truly stated, to a bill for partition. If Church had been made a party by name, and his adverse possession under claim of exclusive legal title, had been set forth in the

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bill, he might have demurred successfully to the jurisdiction of the court to try his title in this form of action. Or if his adverse possession and title had not been set forth in the bill, he might have set it up, and would thereby have ousted the court of jurisdiction as to him. If then he would not have been a proper party to the suit by name, how can he be deemed to be included under the general term "unknown owners?" or does that term embrace persons who could not be made parties to or bound by the proceedings under any other designation?

The attorneys for Nash attempted to apply to this case certain authorities that a judgment is conclusive as to everything actually tried, or that might have been put in issue and tried between the parties in the action in which the judgment is rendered. This principle, if correct, does not aid the force of the judgment or partition in our case, because—1st. It assumes that we deny that the defendants, Church *et al.*, were parties or privies to that partition, or were served with process in the suit. 2d. It is not true in fact that Church's title set up in defence to this ejectment could have been tried in the partition suit.

On the last point there can hardly be a doubt. Partition in equity was never intended as a substitute for ejectment at law. A bill for partition does not lie where the defendant is in possession, claiming adversely. *Adam vs. Ames Iron Co.*, 24 Conn., 230; *Groves vs. Groves*, 3 Sneed, 187; *Martin vs. Smith*, Harper, 106; *Wilkin vs. Wilkin*, 1 J. C. R., 111; *Straughan vs. Wright*, 4 Rand., 493; *Clapp vs. Bromagham*, 9 Cow., 530; *Burhans vs. Burhans*, 2 Barb., ch. 398; *Garrett vs. White*, 3 Ire., 131; *Maxwell vs. Maxwell*, 8 id., 28; *Toust vs. Moorman*, 2 Carter, Ind., 171; *Corbitt vs. Corbitt*, Jones, Eq., 114.

If the title of the plaintiff is denied, the court would formerly send the plaintiff to a court of law, to try his title, before proceeding with partition. *Cox vs. Smith*, 4 J. C. R., 271; *Phelps vs. Green*, 3 id., 302; *Jenkins vs. Van Schaick*, 3 Paige, 245; *Hosford vs. Merwin*, 5 Barb., 51; *Manners vs. Manners*, 1 Green Ch. 384; *McCalls, Lessee, vs. Carpenter*, 18 How., 297.

There is nothing in chapter 108, of the Revised Statutes, which changes this. Sec. 16 authorizes the "defendant to deny the joint tenancy, or tenancy in common, of any co-defendant," and provides for issues of fact between the parties,

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or any of them, to be tried by a jury. But it is submitted, that when the seizin of the plaintiffs in the bill is denied by a person setting up possession under an adverse title, the plaintiffs cannot, in the same suit, have a trial and determination of the validity of the defendant's title. But the plaintiff must regain the actual seizin, by ejectment, before he can sustain a suit for partition. 3 Paige, 245; 9 Cow., 530.

To give the effect to this partition record, against the appellants, which is claimed by Nash, would not only work the greatest injustice, but would operate the greatest fraud in law and in fact upon them. The defendants were in actual and notorious adverse possession of the lot in question, and had been for years prior to the partition suit, claiming the legal title under a deed of conveyance from the then owners of the lot in fee. Such actual possession and occupation were as complete notice of their title, as the registry of a deed of conveyance. The plaintiffs were bound to take notice; were chargable in law with actual knowledge of their interest, and that it was an adverse possession and claim of title. It was a fraud upon Church and Buchmann, and upon the court, to ignore this title, and attempt to prejudice the rights of well known parties, by a proceeding allowed only when the parties are in fact unknown, and then withhold from the court the proofs respecting their title.

If Church was bound to appear and defend this bill for partition, or be ousted from his possession, and barred of all title and claim to the lot, there is no security whatever to property. The evil needs no illustration, and it is enough to say, that a reasonable construction can be given to the provisions of the law, without involving consequences so fatal to justice.

There are very few authorities upon the effect of such a record; we have found none just in point. The case in 2 Hill, 626, which was relied upon below, came before the appellate court in a very loose shape, and was evidently but little considered; there was, however, no doubt that the plaintiff in that case was seized, and in possession of the premises as tenant in common, and as such entitled, under the statute, to maintain the suit for partition. The defendant held under sheriff's deed on sale of a portion set off to unknown owners, for their share of costs; and the court held that defendant had a perfect title.

Both in Iowa and New York the statute remedy by parti-

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tion is a legal remedy, and issues made are to be tried as in other civil actions. Our statute, however, gives simply an equitable remedy for partition, and by its terms and evident meaning, excludes the idea that it was the intent to try and determine conflicting legal titles.

The proceeding against unknown owners under chapter 108, R. S., is a proceeding in *rem* and in derogation of the common law, and it must be strictly followed, or it will not be binding. *Denning vs. Corwin*, 11 Wend., 647; *Foot vs. Stevens*, 17 Wend., 483; *Castle vs. Mathews*, Lalor's Sup., 438.

Emmons, Van Dyke & Hamilton, for the respondent.

It is true that neither Church nor Buchmann were parties to the record by name, in the partition suit of Wilder Pierce and Ichabod Smith against Hans Crocker and others; but they were nevertheless parties within the meaning and sense of the rule of law, and as such bound by the decree, as we will undertake to show. The counsel here cited and commented on the statute; and claimed that the proceedings were binding upon the defendants, and cited *Cole vs. Hall*, 2 Hill, 626; *Castle vs. Mathews*, Lalor's Sup. to Hill and Denio, 438; *Denning vs. Corwin*, 11 Wend., 647; *Foot vs. Stevens*, 17 Wend., 483; *Hart vs. Seixas*, 21 id., 40; Story's Eq. Jur., § 626; *Anon.*, 3 Swanst., 139, note; *Outram vs. Morewood*, 3 East., 346; *Whitmore vs. Shaw*, 8 N. H., 393.

By the Court, Dixon, C. J. The positions assumed by the respondents' counsel in the argument of this case, I must say, appeared to me novel and somewhat extraordinary. It seemed to me that if they were correct, we should, so far as the appellants are concerned, be compelled to give one of the most unjust judgments ever pronounced in a court of justice; that every sentiment of equity and justice demanded of us to uphold them in their title and possession, or at least to give them their day in court, for the purpose of establishing them. The idea that, under our statute for the partition of real estate, a party in the quiet and undisturbed possession of his property, could be stripped of it by a judicial proceeding, of which he was entirely ignorant, struck me as being so flagrantly and enormously unjust and oppressive, that I thought it could not

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be the law. The taking of a valid title of a person in possession from him and transferring it to another having no right to it by a proceeding of which the owner has no knowledge, and in which his title was not directly adjudicated against him, nor the attention of the court directly called to it, exhibits a most alarming defect in justice. Such a proceeding is opposed to all our notions of law and justice, and we search with anxiety for some mode of escape from it. Such were my impressions of this case at the argument, and, although I am compelled to adopt the views of the respondent's counsel as the correct law, yet I must confess I have not been able, nor am I desirous to rid myself of them.

It is not by the rules of the common law, which courts are at liberty to mould and modify so as to meet the ends of justice, but by the declarations of the legislature upon a subject confessedly within their control, that we are to determine this case. They, not the court, are responsible for the unjust consequences which may flow from its decision. They have prescribed the mode in which parties shall be brought into court, the form of the proceedings, and the effect of the judgment in actions like that under which the respondent claims title. The same power which authorized the wrong must apply the remedy. Our solicitude to save the rights of the appellants has led us to the examination of many cases not cited by counsel, but, pressed as I am for time, I shall only notice such as bear most directly on the questions involved.

The first and second objections made by the appellants' counsel to the partition proceeding, viz: That the allegation in the complaint, as to the existence and interests of parties unknown, was insufficient, and the affidavit was not sufficient to authorize the order of publication, are clearly untenable. The court was a court of general jurisdiction, and its finding and determination of these matters is binding and conclusive in all collateral proceedings. The allegations of the complaint, and

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the statement of facts in the affidavit, were a substantial compliance with the statutory requirement. Mere irregularities in judicial proceedings, which are open to objection directly in the suit, or might be taken advantage of on error or appeal, cannot be drawn in question collaterally, for the purpose of avoiding or impeaching the judgment. *Painter vs. Henderson*, 7 Barr., 48; *Doe vs. Smith*, 1 Carter, Ind., 451; *Foot vs. Stevens*, 17 Wend., 483; *Hart vs. Sexas*, 21 id., 40.

The next and most important question is, whether the appellant, Church, who was, at the time of the commencement and consummation of the suit for partition, an owner in severalty, and in possession of a portion of the partitioned premises, and who was not made a party to the suit by name, or served with process, is bound by the judgment as one of the "unknown owners," who were proceeded against by advertisement. I confess that we should have had great doubt about holding him a party to the suit as an unknown owner, and, therefore, bound by the judgment, were it not for the authority of the case of *Cook vs. Allen*, 2 Mass., 461. The case is so directly in point, the decision by a court of so great respectability and learning, and the reasoning so conclusive, that we are compelled to adopt and be governed by it. The leading facts were like those in the present case, in almost every particular. The suit was by writ of entry *sur disseizin*. The action was tried at the May term, 1807. Cook, the demandant, in support of the action, gave in evidence the proceedings of the supreme court, upon a petition of Joseph S. Reed, for partition, in the year 1800, wherein he asked to have 1000 acres of land set off to him in severalty, out of a tract of 19,000 acres, which 1000 acres he alleged he held in common and undivided with others, to him unknown. Upon the petition the court ordered notice thereof to be given to all persons interested to appear and show cause why the prayer thereof should not

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be granted, pursuant to the provisions of a statute, passed in 1784. The order was executed, and no person appearing, partition was decreed and made. It was shown that the land demanded in the action, and to which Allen the tenant had pleaded *nul disseizin*, was assigned to Reed by the commissioners appointed by the court to make partition; and that Reed had conveyed the same to the demandant. Allen set up title under one Jonathan Frye, who entered upon it upwards of thirty years before, and continued to hold and occupy it, until Allen recovered seizin and possession, by virtue of a mortgage made by Frye to him, in 1787, and which he had forclosed, and ever since possessed the same. Upon the argument in that case, as in this, it was urged that the operation of the statutes was confined to the co-tenants, who were estopped after due service of process under the statute, from contesting the share or property claimed by the petitioner. That the object of the act, and of the process under it, was merely to turn an estate in common into an estate in severalty; that neither the one nor the other were ever considered as furnishing a method of establishing or trying the right of a tenant in common, as against one holding a title adverse to that of the tenants in common. It was further argued, that a judgment of a court binds only parties and privies; that Allen was no party to the judgment, for he claimed nothing as tenant in common; that if he had been named in the petition as a person interested in the land, and personal notice given him, there might have been a pretence for considering him as a privy. But that the whole purpose of the process being to effect a partition of the estate held in common, the tenants in common were the only parties to the process, and notice to all parties interested must be understood to imply notice to the co-tenants alone. The court remarked, that a writ of partition at common law, must name all the tenants as plaintiffs or defendants, and set forth the shares of each; and that

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partition must be made among all. That in that state large parcels of land were holden in common, the tenants were numerous and unknown to each other, and their shares unascertainable; and that partition so necessary for the settlement and cultivation of lands, was, therefore, impracticable by writ at common law. After noticing the provisions of the English statute, 8 and 9 Will. 3, c. 31, designed to remedy like inconveniences, and that of their own state, which declared that "the final judgment should be valid to all intents and purposes," and observing that these words were equivalent to those of the English statute, which declared "it should be good, and conclude all persons, whatever right or title they had in the premises;" the court, by Parsons, C. J., say: "It is reasonable to give the words a construction, by which no person shall be concluded by a partition, where he could not by law be admitted to defend his rights. This construction is conformable to the maxim of the common law, that judgments do not bind the rights of any but parties or privies; understanding by parties all persons who may have been parties on the record, but from their own laches.

"In applying this construction to the statute before us, where in the petition certain persons are named as the co-tenants, if partition be made, none are concluded by it, but the persons named, their heirs and assignees. If in the petition the co-tenants are not named, but are supposed to be persons unknown to the petitioner, and notice is given to all persons interested to appear and show cause against the petition, and partition be made, no person appearing, this partition shall conclude all persons whatever, as to their rights of possession. Any person interested was authorized to appear, and by falsifying any allegation of the petition, in a point material to his defense, might have protected his interest. But if he will lie by and refuse to appear, it is a consent that the petitioner may proceed *ex parte*, and he shall be bound by the parti-

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tion as fully as if he had appeared, and afterwards made default.

"In a writ of partition, the plaintiff alleges that all the parties to the writ hold together and undivided; so in the petition, where the tenants are not known or named, the petitioner, by declaring that he is seized of an undivided share of the land, in effect alleges, that all persons holding the land, or any part of it, are seized as co-tenants with him. And when judgment is rendered in partition, all the allegations material to the rendition of the judgment are to be considered as facts, and all persons concluded by the judgment are estopped from controverting them. In this case, therefore, Allen, the tenant, cannot be admitted, by showing a disseizin of all the tenants in common, to question the right of Reed, alleged in his petition, and supported by the judgment, as he cannot be considered a stranger to the record, and so not bound by it."

To the other objection, that by a true construction of the statute, the right of possession of no person is, in fact, bound by any proceeding under it, but a tenant in common, they say: "It is a sufficient answer to this objection, in this case, that the tenant having been notified of the petition, in which it appears that the petitioner claimed to hold with him together and undivided the premises, and having a legal right to appear and controvert the petition, and judgment being rendered on his default, he is now concluded from saying that he is not a tenant in common." "As the statute contemplates a case where the parties are unknown, it must extend to a case where the particular interests, or rights of the parties are unknown. It is, therefore, enough for the petitioner to show his own right, not being cognizant of the rights of the others. And the showing of his own right to be an undivided interest in all the land, amounts to an allegation that all the persons holding the land, or any part of it, hold together, and undivided with

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him. If any man holding the land, or any part of it, by sole seizin, is named a defendant in a writ of partition at common law, or in a petition on the statute, and, after service of the process, is defaulted, there can be no doubt that his right of possession would be concluded by the judgment. In this case the tenant being described by his interest in the land, according to the petitioner's claim of title, and process being served on him, if he be not bound by the judgment, the remedy where most necessary, and where the mischief is irremediable at the common law, would be at the least useless."

I have quoted at some length from this opinion, partly because it was not noticed at thetrial, but more for its sound reasoning, and because the necessity and policy of the law in providing for proceedings against property of persons unknown is clearly shown. If judgments in such proceedings are not to be held binding and conclusive on all such persons having an interest both as to the amount and nature of their interests, like other judgments, then the mischiefs to be remedied cannot be reached, and partition in many cases becomes an impossibility. The law makes the allegation that they are unknown, and publication of notice equivalent to a suit against them by name where they are known, and personally served with process. If the defendant Church had been sued by name and served with process, and had made default, no one can doubt that such default would have been a confession by him according to the allegations of the complaint, that he was a tenant in common. The statute gives precisely the same effect to the proceeding in the form in which it was had. The good faith of the complainants in the partition suit is not denied. No fraud or design on their part in omitting to name him as a party and serve him with process is alleged. The whole proceeding seems to have been fair on their part, and his omission as a direct party the result of ignorance or mistake.

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A specific reference to the provision of our statute is unnecessary. It is sufficient generally to say that the complaint, which must be verified by oath, shall particularly describe the premises sought to be divided and set forth the rights and titles of all persons interested therein so far as the same shall be known to the plaintiff; that he is required to exhibit before, and the court to take *proof* of his title; that upon the hearing of the cause the court shall ascertain from the proofs taken, in case of failure to answer the complaint, and *declare the rights, titles and interests of the parties to such proceedings, plaintiffs as well as defendants, so far as the same shall have appeared; and shall determine the rights of the said parties in such lands, and render judgment that partition be made according to such rights; and that such judgment shall be binding and conclusive.* 1. On all parties named therein, &c. 2. *On all persons interested in the premises who may be unknown, to whom notice shall have been given by personal service, or by publishing the same as thereinbefore directed;* and, 3. On all persons claiming from such parties or persons, or either of them. From these provisions the requirement that the court determine the title and the conclusive effect of the judgment are evident.

The hardship of the present case arises from the omission of our legislature to do what that of Massachusetts, Maine and many other states have done, namely, to provide that the rights of those persons unknown who have not appeared and answered, and who claim by paramount title, or to hold in severalty the whole or any part of the premises mentioned in the complaint, shall be excepted from the conclusive operation of the judgment. For the sake of justice to these defendants it is to be wished that such exception had been made. It will be observed in the case above cited, that the conclusiveness of the judgment as to the right of possession only is affirmed. The action being by writ of entry, the right

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of possession alone was contested. The effect of the judgment as to Allen was only to sever the possession and put Reed and his assigns in. The court expressly said that he was still at liberty to assert his paramount or several title by writ of right. See R. S. Mass., 1836, chap. 103, § 38; *Pierce vs. Oliver*, 13 Mass., 211.

In addition to the cases cited by the respondent's counsel, showing the conclusive effect of the judgment of partition upon the right, *Herr vs. Herr*, 5 Barr, 428, and *Doe vs. Smith, supra*, may be referred to as directly in point. In *Herr vs. Herr* it was held that a decree of partition by the orphans' court of Pennsylvania was necessarily as conclusive of the right as a judgment of partition in a court of law, although the orphans' court had *no jurisdiction* whatever to try the title, if an adverse claim was made; whilst in a court of law the title might be put in issue, and be found by the judgment. In that case a party having no title under the intestate petitioned for an inquest, alleging a title as tenant in common which was not disputed by the real heirs. Upon this allegation a decree of partition was made. The court say that the joint tenure was established by the judgment, *quod partitio fiat*, and was conclusive when coming collaterally into contest between the same parties in a subsequent proceeding. The authority of this case may be considered as somewhat shaken by the subsequent case of *McClure vs. McClure*, 2 Harris, 134, decided by the same court. I do not myself clearly see how they can be reconciled, and yet the doctrine of *Herr vs. Herr* is expressly acknowledged and sanctioned. I think *McClure vs. McClure* is one of those *favorable cases which make bad precedents*. It cannot be supported on the doctrines which the court profess to hold. Somewhat opposed to these cases are *Tabler vs. Wiseman*, 2 Ohio St., 207; and *Grice vs. Randall*, 23 Vt., 239; but comment upon them is deemed unnecessary. Judgment affirmed.

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MARVIN *vs.* TITSWORTH et al.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard October 20, 1859.] [Decided January 4, 1860.

Trusts—Mortgages—Estoppel—Court Commissioner—Evidence—Public Land.

Where S. was indebted to C. and made a trust deed of lands to F., conditioned, that if S. paid his indebtedness to C. by a certain day, then F. should reconvey the lands; but if S. did not pay C., then F. should advertise and sell the lands, pay C. and return the surplus money to S.: Held, that this deed could not be regarded or sustained as a mortgage, nor could it be foreclosed by advertisement and sale under the statute.

A mortgage is the conveyance of lands by a debtor to his creditor, as a pledge or security for the payment of a debt, and to become void on payment.

A deed to a trustee conditioned that if the grantor did not pay a debt due from him to a third party, then the trustee should advertise and sell the lands, pay the debt, and return the surplus money to the grantor, does not constitute a mortgage. The trustee is the mere agent of both parties, and such a trust being prohibited by our statute, the legal title remains in the grantor.

The test whether a conveyance is a mortgage, or a trust, is to be determined by the question, whether the trust is to be executed by the creditor or a third party; if by the former, it is a mortgage; if by the latter, a trust.

A conveyance to a trustee conditioned, that if the grantor does not pay a debt due from him to a third party, the trustees should advertise and sell the lands, pay the debt and return the surplus money to the grantor, was not authorized by chap. 57, § 11, R. S., 1849, authorising the creation of express trusts to sell lands for the benefit of creditors, because the conveyance was conditional and not absolute, and provided for a reconveyance to the grantor, instead of an absolute sale for the payment of the debt.

A sale of lands, without the aid of court of equity, was made by the trustees named in a conditional deed of trust, which was not authorized by law: Held, that the purchaser acquired no title under such sale, against the grantor in the deed or his assigns.

A judgment in a partition suit, where the proceedings were regular, under the statute, is conclusive as to the title of the premises, as against all who are made parties by name; and where the proceedings are against "unknown owners," as against all the world.

A county judge in the exercise of the power of a circuit judge at chambers, may make the necessary orders in a suit of partition.

Courts will take notice of the legal subdivisions of sections without a designation of boundaries to lands, by posts, stones, or other monuments.

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This was an action commenced by David M. Marvin against Abram Tittsworth, John D. Titsworth, Rudolph Titsworth, William Dunn, Francis Clark and L. C. Paine Freer, to recover possession of lands. The complaint contains the following allegations: That on the 24th day of January, A. D. 1850, William B. Sanford was seized in fee of the lands described in the complaint, and that on the same day he made and delivered to the defendant, L. C. Paine Freer, a mortgage on the same premises, reciting among other things, that he was indebted to the defendant Clark in the sum of $402 11, as expressed in three promissory notes constituting that amount. That to secure it, he granted, bargained and sold unto L. C. Paine Freer, the premises upon trust, that if Sandford should fail to pay the notes at maturity, or either of them, it should be lawful upon demand of Clark, for Freer to advertise the premises for sale, in any newspaper published in the county of Racine, for thirty days; and then sell them in the city of Chicago in the state of Illinois, to the highest bidder for cash, with all the rights and equity of redemption of Sandford, and to execute a deed to the purchaser in the name of Sandford, and from the proceeds to pay the expenses of the sale, and all liens and encumbrances on the lands and the notes, and render the surplus to Sandford; and upon the further trust that, after the notes should be paid, to reconvey the premises to Sandford at his costs.

That on the 7th day of May, 1852, Sandford conveyed an undivided half of the premises in fee, to the plaintiff. That previous to the last sale, Sandford had made payments to apply on the notes to the full amount thereof, with interest; that the plaintiff has often applied to the defendants to adjust and settle the balance on the notes, and they have refused so to do; that they claim to have acquired some claim or interest in the mortgage, or in the premises; that defendants Titsworth and Dunn claim now, and have for four or five years past, to own the premises under a deed from Freer as his attorney, bearing date January 29, 1853, and which recites that Sandford had failed to pay the notes; that Titsworth and Dunn were legal holders of the notes, and there was due thereon $325, and Titsworth and Dunn had demanded a sale of the premises under the mortgage, and the premises had been duly advertised for sale, as required by the mortgage; that Freer did, on the 4th day of August, 1852, sell the same at the door of the court house in the city of Chicago, at pub-

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lic vendue, to Titsworth and Dunn, they being the highest bidders therefor. That the plaintiff had no notice of the sale; he therefore demands that an account be taken of the amount due the defendants, and that on payment of the sum the premises stand redeemed, and the mortgage be deemed satisfied, and the deed from Freer to Dunn and Titsworth be deemed to be void, and that Freer be decreed to reconvey the premises to the plaintiff, and for general relief.

To which the defendants answer in substance as follows: They deny that William B. Sanford, on the 24th day of January, 1850, or at any time, executed any mortgage to the defendant, L. C. Paine Freer; but admit, that on that day he executed to him a deed of trust, empowering him to convey all his interest in the premises, including all equity of redemption, in case Sandford should make default in the payment of the promissory notes mentioned in the complaint, or any of them. The defendant Clark answers, that after the making and before the maturity of the notes, he transferred them by endorsement to the defendants, the Titsworths and Dunn, partners in business at Chicago, and that he has no interest therein.

The defendants further answer jointly, and deny that Sandford has paid the amount due upon the promissory notes, and allege that at the time of the sale of the premises, $324 was due and unpaid; that upon such default Titsworth & Co., the legal holders of the notes demanded of Freer that the premises should be sold in pursuance of the deed of trust, to satisfy the notes. The defendant Freer, answering for himself, alleges that upon such demand, he proceeded to advertise the premises in the Racine Advocate, a newspaper published in the city and county of Racine, for thirty days previous to the 4th day of August, 1852, and on that day sold the same at the city of Chicago, Illinois, to Titsworth and Co., and executed and delivered to them a deed thereof in the name of William B. Sandford, according to the terms of the deed of trust. The defendants deny that Sandford, or any person or persons claiming under him, has or had any equity of redemption in the premises after the sale, and aver that such sale vested in Titsworth & Co. an absolute estate in fee simple.

The defendants, Titsworth & Co., allege that they are owners in fee simple and are in possession of 72.24 acres of the premises; and that they claim the same by virtue of a final decree of partition made by the circuit court for the county

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of Racine, at a special term, on the 15th day of August, 1856, between them, and the plaintiff, and one Luther, which decree remains in full force. The defendants ask that the complaint be dismissed with costs.

The plaintiff demurred to the answer for insufficiency, for the reason that it does not state facts sufficient to constitute a defence in the action, and that it does not appear from the answer that the circuit court for the county of Racine had jurisdiction of the cause and parties therein mentioned.

The action came on to a hearing at a circuit court on the 18th day of April, 1859, before the Hon. David Noggle, circuit judge, who decided for the plaintiff and against the defendants, as follows:

"This action having been brought to a hearing, and tried upon the issues of law, arising by reason of the demurrer to the amended answer of the complaint therein, and counsel for the respective parties having been heard thereupon, and due deliberation having been had by the court thereon.

"Judgment is ordered by the court in favor of the plaintiff upon said issues, with costs.

"And it is further ordered and adjudged that it be referred to L. B. S. Miller, Esq., to take the testimony and state the amount of balance due upon the promissory notes mentioned in the complaint in said action, over and above the value of the rents and profits of the premises also mentioned in said complaint, and that he report the same, with the testimony taken by him to this court with all convenient speed.

"And it is further ordered and adjudged, that upon the coming in and confirmation of such report, the plaintiff's costs and disbursements in this action, be deducted from the amount reported due upon said notes, and that the plaintiff may then pay to the defendants' attorneys, or the clerk of this court, the balance of the amount remaining unpaid on said notes as reported, and thereupon that the premises mentioned in said complaint, stand fully redeemed and discharged from the mortgage or trust deed mentioned in said complaint, and from the operation and effect thereof, and from all proceedings thereon in pursuance thereof, subsequent to its date, and that the sale mentioned in said complaint, by the defendant Freer, and his deed of said premises to the defendants Titsworth and Dunn, be adjudged null and void, and that the defendants release and convey the premises to the plaintiff, and that he be let into possession of said premises, on

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production of a certified copy of this judgment, and proofs by affidavit of the payment of the balance of said notes as aforesaid."

From which judgment the defendants appealed.

Paine & Millett, for the appellants.

1. The deed of Sandford to Freer, vested in the latter an estate in fee simple, subject to no conditions whatever, except the trust therein named. Rev. Stat., 1850, chap. 57, § 16.

2. The sale of Freer, the trustee, transferred to the appellants; absolutely and unconditionally, all the estate that Sandford ever had in the premises, divested of all equity of redemption in him, his heirs or assigns. *Sampson vs. Pattison*, 1 Hare, 533; *Bank Metropolis vs. Gutschenk*, 14 Peters, 19; 1 Hill. on Mort., 358.

3. The decree in partition, allotting the undivided portions of these premises to the respective owners in severalty, being rendered by a court of competent jurisdiction concludes the parties, and cannot be impeached collaterally. Rev. Stat. of 1850, chap. 108, § 31; *Kane vs. Parker*, 4 Wis., 123; *Sheldon vs. Newton*, 3 Ohio St., 494; *Vorhees vs. Bank U. S.*, 10 Peters, 449; *Thompson vs. Tolime* 2, id. 165; *Grignon vs. Astor et al.*, 2 How., 335; *Piatt vs. Hubbell*, 5 Ohio, 217; *Dalney vs. Manning*, 3 id., 321.

C. S. Chase & Judd, for the respondent.

1. The instrument from Sandford to Freer, set out in the pleadings, purporting to be a deed in trust, is, in fact, and in law, a mortgage. *Rogan vs Walker et al.*, 1 Wis. R., 527; *Lawrence et al. vs. Farmers' Loan and Trust Company*, 3 Kern., 200; Willard's Eq. Jur., 426, 427, 428–9.

2. The instrument being a mortgage, it could be foreclosed so as to cut off the plaintiff's equity of redemption, only by advertisement and sale in the manner pointed out by our statute, or by a direct action upon it in the circuit court, in which the plaintiff should have been made a party. R. S., 1849, 619, § 1; id., 620, 621, 622; R. S., 1858, 894, § 1; id., 896, 897, 898.

3. The pretended sale, without notice to the plaintiff at Chicago, was a fraud upon him, and is, therefore, void.

4. The plaintiff being a subsequent purchaser of the premises is entitled to his equity of redemption on payment of the balance unpaid on the mortgage.

5. The second defense set up in the amended answer does

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not state facts sufficient to constitute a defense to the action. It does not allege that a suit or action was commenced by the plaintiffs therein, against the defendants therein, nor any other facts giving the Court jurisdiction of the parties or cause, nor that the court had jurisdiction to make an order or decree therein. The order for the publication of notice to the absent defendants, was made by a county judge or court commissioner, and not by the court or a judge thereof, and is, therefore, void. The facts authorizing such an order, should have been made to appear to the court by affidavit, and the court, or a judge thereof, not a county judge or court commissioner, if satisfied with such proof, could have granted such order. R. S., 1849, 571, § 11; R. S., 1858, 145, § 11.

6. The proceedings and decree in partition, if they were otherwise in accordance with the statute, are in no respect a bar to this action. The question of title was not tried, nor does it purport to have been tried. A suit in partition has never, it is believed, been held to dispose of or settle the title; and certainly not unless the statute had been strictly complied with; it is conclusive only as to the number and extent of the parts into which the premises have been divided. The office of an action in partion is to separate the estate in a given case, between the apparent owners, leaving the question of title to the different parts, to be tried in a proper action.

By the Court, Dixon, C. J. The nature of the instrument executed by Sandford to Freer, on the 24th of February, 1850, was a point of much controversy on the argument. On the part of the respondent it was contended, on the authority of *Lawrence vs. Farmers' Loan and Trust Company*, 3 Kern., 200, and the cases there cited, that it was a mortgage; and never having been foreclosed, either in equity or by advertisement, under the statute, a right of redemption still remained in the respondent, as the assignee of Sandford. It was upon this theory that the suit was commenced. On the part of the appellants it was insisted that it was a trust deed, creating a trust authorized by the first subdivision of section 11, chap. 57, R. S., 1849; and that both by the sale made by Freer, the trustee, at Chicago, on the 4th of August, 1852, and

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by the operation of section 16, of the chapter above referred to, an absolute estate was vested in the appellants. In many respects it partook of the nature of both; yet we are clearly of opinion, that it cannot be regarded as a mortgage.

A mortgage is defined to be the conveyance of lands by a *debtor* to his *creditor*, as a pledge or security for the payment of a debt, and to become void on payment of it. The creditor in this case, and party for whose benefit the security was taken, was Clark. Freer had no interest whatever in the matter. He was the mere agent or trustee of both parties. In the case of *Lawrence vs. Farmers' Trust and Loan Company*, the instrument or trust deed was executed directly to the company, who were creditors of Champlin, as a security for the payment of his debt; and in case of default in its payment by him, they were authorized to sell the property, either at public auction, or private sale, and out of the proceeds to pay themselves, returning the surplus money to Champlin or his heirs. This instrument, though not in the usual form of a mortgage, nor intended by the parties as such, the court pronounced to be in law a mortgage, and held that a sale by the trustees, not in compliance with the provisions of their statute respecting foreclosures by advertisement, did not cut off the equity of redemption of Champlin and his heirs. The same is true of the cases of *Eaton vs. Whiting*, 3 Pick., 484; *Chowning vs. Fox*, 1 Rand., 306; *Palmer vs. Gurnsey*, 7 Wend., 248; *Ogden vs. Grant*, 6 Dana, 473; and *Cooper vs. Whiton*, 3 Hill, 95; upon the authority of which that case was decided.

In all these cases the power to sell was vested in the party for the payment of whose debt the sale was authorized. In *Chowning vs. Fox*, the reason for holding such a conveyance a mortgage instead of a deed, giving an absolute power of sale, is clearly stated. The court say that the question is whether a deed executed by a debtor, conveying land to his

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creditor, and purporting to constitute him the trustee for selling the land, and applying the proceeds of the sale to the payment of the debt due to himself, can be regarded otherwise than as a mere mortgage, to which the right of redemption is incident; or, in other words, whether a creditor thus constituted as trustee can, by the mere authority derived from the deed, and without resort to a court of equity, sell the lands so as to bar the rights of the debtor, and those claiming under him; and they held, that in Virginia he could not. The reason given was, that such a power could only be vested in a third person, disinterested and indifferent between the parties; that the principles frequently declared in relation to the powers and duties of trustees in general, were utterly incompatible with the due exercise of those powers and duties by the creditors.

In *Lawrence vs. Trust & Loan Comp.*, the court held that such powers could be given to and exercised by the creditor, and that the whole matter was governed by the statute. The same is true with us. The instrument before us, so far as it was given to secure the payment of a debt, and conditioned for a reconveyance, in case of payment, and for a return to Sanborn of the overplus in case of a sale after failure to pay partakes of the nature of a mortgage. The test by which it is to be determined whether such an instrument is a mortgage or a trust seems to be, whether it be executed to a creditor or a third person. If to the former, it is a mortgage; but if to the latter, a trust.

In *McLanahan vs. McLanahan*, 6 Hump., 99, where real estate was conveyed to a creditor, with the understanding, and upon the trust that the creditor should satisfy his debts, indemnify himself against liabilities, pay the other debts of the vendor, and hand over the balance to his wife and children, it was holden that it was a mortgage as to the debt of the vendee, and a trust as to the balance.

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In *Cooper vs. Whitney*, Judge Bronson said of a similar conveyance, that he was strongly inclined to the opinion that it should be regarded as a trust rather than a mortgage.

In *State vs. Lawson*, 1 English, 269, it was decided that an instrument like that under consideration partook so far of the nature of a mortgage that the vendor or *cestui que trust* had an equity of redemption which was liable to seizure and sale upon execution. The court, although they held it a trust, said it was not strictly a trust deed; that a conveyance, unconditional and without a reservation to the vendor, of any right of redemption upon payment of the money would have been. In *Humphrey vs. Snyder*, 1 Morris, 263, it was holden that the trustee named in a similar conveyance could not forclose in equity.

Mr. Burrill in his work on assignments, page 33, says that in most of the southern states "assignments in trust are frequently employed for a double purpose, ultimately as modes of provision for the *payment* of debts, but immediately as instruments of *security* against default of payment by the debtor. Hence, they are in many cases drawn with a condition that if the grantor pay the debt provided for, within a specified time, the trustee shall reconvey to him the property; or that the deed shall thereupon be void; or *e converso*, that if the debtor do not pay the debt by a day named, called the 'law day,' the trustee shall sell the property and apply the proceeds in payment. And special deeds of trust, with such conditions, are frequently made directly and exclusively to particular creditors, which gives them still more the character of mortgages. They are in fact mortgages, with the qualities of an assignment in trust superadded; or assignments to take effect at a future day." No case will be found, we think, which goes the length of holding them mortgages. See *Hewitt vs. Haling*, 11 Pa. St., 27.

It being determined that it was a trust and not a mortgage,

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it remains to be inquired whether it was authorized by sec. 11, of chap. 57, of the statutes of 1849, above referred to. We are of opinion that it was not. By the first section uses and trusts, except as authorized and modified, by that chapter were abolished. By section 11 express trusts might be created for any or either of five purposes therein specified. The only purpose material to be considered here is the first, viz: "To sell lands for the benefit of creditors." These words seem to point plainly to those absolute transfers made by debtors in embarrassed or insolvent circumstances of their estates to trustees for the benefit of their creditors, for the purpose of being turned into money and applied by the trustee to the payment of the debts due and owing by the assignors. The statute does not have regard to a conditional conveyance, by which the property may be reconveyed or revested in the debtor, but to an absolute assignment to sell and pay at all events. This construction seems plain and obvious. See *Ridgway vs. Stewart*, 4 Watts and Serg., 383; and *Manufac. & Mech. Bank vs. Bank Penn.*, 7 id., 335.

The instrument being neither a mortgage nor such a trust as by our statute the parties were authorized to create, it follows as a matter of course that none of the defendants acquired such a title to the property under it as would enable them on that ground alone successfully to defeat the action of the plaintiff. The intention of Sanborn no doubt was to secure a *bona fide* debt, which he owed to Clark, and there can be little question that under the circumstances a court of equity upon a proper application would have given effect to that intention as an equitable mortgage, notwithstanding the irregularity of the instrument, and would have made it available as a security at least as against the maker. There is as little doubt also that it could not have been foreclosed by advertisement under the statute. These are questions however not strictly pertinent to inquiries before us.

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There is however a matter which we think decisive of the present controversy, and for which the judgment of the circuit court must be reversed. We have decided in the case of *Nash vs. Church*, at this term, *supra*, 303, that a judgment in partition, where the proceedings were regularly had against unknown owners, was conclusive as to title of the partitioned premises, as against all the world. *A fortiori*, it must be held conclusive as against all persons who were made parties and brought in by name. Marvin was party defendant to the suit in partition in which judgment was rendered August 15, 1856, by the circuit court of Racine county. He was regularly brought in by publication under the statute. The objection to the order of publication is clearly untenable. Section 5, of chap. 131, of the statues of 1849, authorized county judges to exercise the power of a judge of the circuit court at chambers. The same power of making the order was conferred upon him as upon the circuit judge. That there was no proof of title, cannot be listened to. The judgment recites that it appeared from the abstracts, exhibits and testimony adduced by the complainants, that they were entitled *in fee* to one equal undivided half of the premises. This is conclusive upon that question. The provisions of section 26, of chap. 108, statutes 1849, must be regarded as directory to the commissioners; and when, as in that case, the allotments made are susceptible of an accurate description, by reference to known public boundaries or government surveys, they must be regarded as sufficient, without a designation of boundaries by posts, stones, or other permanent monuments. These directions can only be held applicable to those cases where such monuments become necessary to an accurate and clear description of the several parts or portions allotted.

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

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CALDWELL *vs.* LAWRENCE.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard October 20, 1859.] [Decided January 4, 1860.

Lien—Assignment.

The lien of the mechanic, lumberman, &c., for work and materials, is a personal right, and cannot be transferred or assigned, so as to enable the assignee to prosecute the claim in his own name and avail himself of the benefit of the lien given against the building.

This was an action commenced by Eben E. Caldwell against Judah M. Lawrence, to enforce a lien for lumber furnished by Lansing Bicknell, a lumber merchant, to Lawrence, and used in the construction of a dwelling house. The amount had been determined between Bicknell and Lawrence, and a note for $71 51 given for its payment; and Bicknell filed his lien under the statute for the amount; but before suit brought, assigned the note to Caldwell, who now brings this suit. To the complaint filed there was a general demurrer. This demurrer was overruled, and the defendant was then defaulted for want of an answer; and the cause was referred to a commissioner, who reported that the lumber had been furnished and used, and its value. Upon this report judgment was rendered for the damages and costs, and declaring the lien and directing its sale.

From so much of the judgment as declares the lien, the defendant appealed to this court.

Cary, Farr & Evans, for the appellant.

Geo. B. Judd, for the respondent.

By the Court, PAINE, J. Without attempting to determine any of the other questions discussed in the briefs of counsel, we think so much of the judgment as is appealed from, must be reversed, for the following reason: It was a proceeding to

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enforce a lumber merchant's lien, prosecuted by the respondent in his own name, he being an assignee of the claim. And we have come to the conclusion that such a lien is not assignable, so as to enable the assignee to prosecute the claim in his own name, and avail himself of the lien given by the statute to mechanics and material men. There is nothing in the general statute on the subject making such liens assignable, nor is there anything expressly prohibiting it. But it gives the right to the mechanic, or the one who has furnished the materials. It provides that he may file his petition or claim, and contemplates, through all its provisions, that he is the one to avail himself of the privileges which it gives. The general rule is, that a lien is a personal right and cannot be transferred. *Daubigny vs. Duval*, 6 T. R., 604. And it seems to have been modified only to the extent of allowing the party to transfer the property to another for his own benefit, and to hold as his agent, so that the lien may be preserved, *Urquhart vs. McIver et al.*, 4 John., 102; *McCombe vs. Davies*, 7 East., 5.

The legislature seem to have taken the same view of the statute that we have, for last winter they passed a law amending the general law, by providing that any number of persons having liens may assign their claims to one of their own number, and that such assignee may have the benefit of the lien granted by the act. Laws of 1859, chap. 113. This shows that a special provision was considered necessary to enable any assignee to have such benefit, and implies that no other assignee is entitled to it now.

The case of *Pierson vs. Tincker*, 36 Maine, 384, is exactly in point, and sustains our conclusion. And although it would seem that the question would have frequently occurred, we have not found any other case where it has been decided.

For the reason stated, so much of the judgment as is appealed from, is reversed with costs and the case remanded.

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NEWMAN et al. *vs.* KERSHAW.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard October 26, 1859.] [Decided January 4, 1860.

Usury—Amendments—Contracts.

In pleading usury the rule is well settled, that the facts must be set forth with certainty, so that the court can see that they amount to usury, and what was the amount of the usurious interest.

A defect in stating the facts of usury, should, as a general thing, under the code, be reached by a motion to make the pleading more definite; and not by a demurrer to the plea.

The rule in regard to pleading usury is so strict, that defects in regard to certainty are to be held matters of substance; and no evidence can be given under a pleading containing only general allegations of usury.

There is no doubt of the power and duty of courts to allow amendments to pleadings in furtherance of justice, and upon such terms as may be proper; and under this power of the court, a defense of usury may be amended. But whether in such case it might not be "a furtherance of justice" to require the party to pay the principal sum loaned, as a condition of amendment. Quere?

Under the general rule that contracts are to be governed by the law of the place of performance, it is held that a contract for the payment of money, made in one state, where the interest reserved would be illegal, is still valid, if it is payable in another state, where the interest is legal, there being no intent to evade the laws of the state where the contract was made; so contracts have been held illegal, although valid by the law of the state where made, if payable in a state where they would be void for usury.

A contract made in a state where it is valid, but which is to be performed in another, where it would be invalid, must depend for its validity on the decision of the question of the laws of which of these states shall govern the contract, and this should be determined by the intention of the parties, gathered from the whole transaction, rather than from the fact in which of the states the security for the performance of the contract shall lie; though the location may have an influence in determining what that intention actually is.

The place of payment may, in the absence of any more controlling circumstances be sufficient to show that the parties intended to refer the contract to the law of that place; but if the loan was actually made in another state, the money to be used, the parties residing, and the security given there, and if by the law of that state, the contract would be valid, but invalid by the law

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of the place of payment, these facts may well be held to have a stronger influence in showing the intention, than the mere place of payment; and where the intention is rebutted, the rule should cease.

The case of *Platt vs. Robinson, supra* 128, considered and approved.

The case of *Fisher et al. vs. Otis*, 3 Chand., 83, considered and defined.

The mere writing, by which the repayment of a loan is secured, does not always evidence the whole of a contract, or transaction between the parties, and therefore does not disclose the entire place of performance, or whether the contract be valid or not; thus on a contract to loan, the lender performs his part in one state, and the place of payment is in another, the place of the performance being partly in one state and partly in another, then the laws of the first state would be applicable, and the contract be held valid; whereas, if the loan were made in the latter state, the money used and to be repaid there with usurious interest, it would be invalid.

A subsequent purchaser of real property is entitled to avoid a prior incumbrance, by mortgage, on the ground of usury in the making thereof; as where the defendant to an action to foreclose a mortgage, as subsequent purchaser set forth that he purchased the property with the information from the grantor of the usurious character of the prior mortgage, and relied on being able to avoid it for that reason; that he had also given the grantor a mortgage for a part of the consideration money: Held, that he might might make that defense.

Upon a defense of usury, it is not necessary to allege a tender of the principal loaned in the pleading, before the party should have the benefit of the plea, nor was the want of such an allegation a ground of demurrer.

The provision of the statute of Wisconsin, requiring the party who relies upon the defense of usury to avoid the payment of interest, to prove that he had tendered the principal sum loaned, before he shall receive any advantage of such defense, was designed only to regulate the effect and validity of contracts made under it, and not of those made under the laws of another state; thus they are not applicable to a contract made in the state of New York, and to which the laws of that state apply.

The *lex fori*, which applies to the remedy upon contracts, is not to be extended so as to make a contract void for usury in one state valid in another, where it is sought to be enforced upon the security.

If a defendant in an action to foreclose a mortgage on land in this state, sets up a good defense of usury under the laws of New York, and is able to sustain it without the affirmative aid of a court of equity, there being no law requiring him to pay the principal, he is not bound to make an offer to pay before he can have the benefit of the defense.

Whether a party can be examined for the purpose of eliciting facts to enable the opposite party to plead usury; and whether if he can, an application for such an examination, is such a resort for affirmative relief to a court of equity, as under the law, as it now exists, of authority to examine parties as witnesses, requires the payment of the principal sum loaned. Quere.

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This was an action brought by William H. Newman and Edward Franks against John Kershaw, impleaded with Theodore Perry, and several others, to foreclose a mortgage upon premises situated in the State of Wisconsin, and which was executed and delivered by Perry to them, within the state of New York, to secure a bond for $20,000, with interest at seven per cent. Kershaw alone answered the complaint, and averred that he was a subsequent purchaser of the mortgaged premises, for the consideration of $33,000; that he bought the premises, believing the mortgage to be void, because of usury in making the bond and mortgage. The usury was set forth to the effect, that the defendant was informed and believed, &c., that heretofore, at various times during the winter of 1855, and the spring and summer of 1856, at the city, county, and state of New York, it was corruptly, and against the form of the statute of the state of New York, in such case made and provided, agreed by and between William H. Newman, and Edward Franks, and Theodore Perry, that Newman and Franks should lend and advance to Perry large sums of money, to the amount of twenty thousand dollars, and that Perry should pay to Newman and Franks, and they should receive interest upon such loans, and for the use and forbearance of said sums of money, at and after a rate greater than the rate of seven dollars upon one hundred dollars for one year, to-wit: at and after the rate of seven dollars upon one hundred dollars for one year, and the further sum of two dollars and fifty cents upon one hundred dollars for alleged commissions, to be paid by Perry to Newman and Franks for such loans and advances; and which moneys, so to be loaned and advanced, this defendant is informed and believes, and states on his information and belief, were the moneys of Newman and Franks, and the additional two dollars and fifty cents on the one hundred dollars, so agreed to be paid and received as commissions, in fact, was for the use and forbearance of the moneys of Newman and Franks, and above the interest at the rate of seven dollars on the one hundred dollars. That the loans were made to the amount of $20,000, but the dates of the loans, the amounts, and the periods of forbearance, he could not state more particularly, and he prayed the examination of the plaintiffs in reference thereto. The answer then set forth the statute of New York at length, and averred that the contract was void under the statutes of that

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state. To this answer the plaintiff filed a general demurrer; which was sustained, and from that order the defendant took this appeal.

Crooks, Wells & Brigham, for the respondent.

1. The answer does not state facts sufficient to constitute the defence of usury. A party setting up the defence of usury must aver clearly every particular necessary to establish the usury charged. The usury must be set up in distinct terms. The terms of the contract, and the *quantum* of the usurious interest, must be specified and distinctly set out. *Cloves vs. Thayer*, 3 Hill, 566; *New Orleans G. L. & B. Co. vs. Dudley*, 8 Paige, 457; *Curtis vs. Martin*, 11 Paige, 17; *Fay vs. Grimsted*, 10 Barb., (S. C.,) 321; *Gould vs. Horner*, 12 Barb., (S. C.,) 601; *Rowe vs. Phillips*, 2 Sand. Ch. 15; *Banks vs. Van Antwerp*, 5 Abbott's R., 411; *Morris vs. Satterley*, 6 id., 74; 1 Saunders, 295, note 1; 5 Leigh's R., 69; 8 Leigh's R., 330.

But the appellant seems to admit the insufficiency of his answer as a defence of usury, and prays the examination of the respondents. This we suppose to be a prayer for discovery, and we suppose it to be bad pleading under the Code. § 291. If a discovery can be sought in this manner, the law of N. Y., on which the appellant relies, provides that, except in the case of a borrower, it can be had only on payment of the sum justly due. The appellant is not a borrower within the meaning of that statute. *Post vs. Pres't Bk. of Utica*, 7 Hill, 393; *Bronson, J., in Vilas et al., vs. Jones et al.*, 1 Comst., 278; *Rexford et al., vs. Widger*, 2 Comst., 131; *Curtis vs. Leavitt*, 15 N. Y. Rep., 107, 108.

2. The appellant here is a grantee of the mortgagor, and he cannot plead usury in the transaction between the original parties, as his defence to this foreclosure, especially when the mortgagor expressly refuses to set it up. It is a personal defence. *Sands vs. Church*, 2 Seld., 35; *DeWolf vs. Johnson*, 10 Wheat., 392; *Reading vs. Weston*, 7 Conn., 413; *Wells vs. Chapman*, 13 Barb., 561; *James vs. Oakley*, 1 Abb., 324; *Farm. and Mech. Bk. vs. K.*, 1 Mann., 84.

3. If the usury is well pleaded, and by a proper party, this mortgage is not usurious. The mortgage is on Wisconsin lands, and the contract is governed by our laws, under which it is not usurious. *Chapman vs. Robertson*, 6 Paige, 627. Although the mere fact that the mortgage is upon Wisconsin lands, may not of itself be sufficient to make this a Wis-

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consin contract, still, if by its terms the contract would be bad in New York, while it would be good in Wisconsin, "that circumstance alone commonly affords a conclusive test." The contract will be so construed as to make it good, and not bad. *Comstock, J., in Curtis vs. Leavitt*, 15 N. Y., 87; *Turpin vs. Powall*, 8 Leigh, 93.

4. If this mortgage is usurious, and if the appellant here can make that defence, still he must bring himself within the Wisconsin rule when he pleads in a Wisconsin court. He must aver a tender of the principal, or our courts cannot listen to his defence. Laws of 1856, page 66, § 2. The *lex fori*, not the *lex loci*, must govern as to the mode of enforcing or avoiding a contract. 1 Chitty Pl., 15, Note 1; 2 Kent's Com., 458; 8 Leigh, 112.

Emmons, Van Dyke & Hamilton, for the appellant.

1. The usury is sufficiently pleaded; and if not, when the plaintiff shall have made the discovery asked for, it may be amended. Code, § 291; id., § 77, *et seq.; Catlin vs. Gunter*, 1 Kern., 368, S. Ct.; *Duel vs. Spence*, 1 Abbott's Pr. R., 237; *Banks vs. Van Antwerp*, 5 Abbott, 411; *Smith vs. Nichols*, 8 Leigh, 330; *Freeman vs. Brown*, 7 Mon., 263.

The right of a defendant to a suit in equity to interpose this defence without offering "*to do equity*," is clearly stated, and the difference of his position, and that when he might be complainant, explained. *Post vs. Dart*, 8 Paige, 639; *Livingston vs. Harris*, 3 Paige, 532.

The point presented for the decision of the Court is, then, whether any party but the borrower can interpose this defence, the statute declaring the contract void. *Shufelt vs. Shufelt*, 9 Paige, 145; *Dix vs. Van Wyck*, 2 Hill, 525; *Pearsall vs. Kingsland*, 4 Ed. Ch., 195; *Sands vs. Church*, 2 Seld., 347; *Jackson vs. Henry*, 10 J. R., 185; *Brooks vs. Avery*, 4 Comst., 225. From the foregoing cases, in the absence of authorities to the contrary, and none can be found, it is apparent that in the courts of the state of New York the defendant can avail himself of the plea of usury.

The same doctrine is held in England, *Mansfield vs. Ogle*, 31 Eng. L. & Eq., 357; in Massachusetts, *Green vs. Kemp*, 13 Mass., 518; by the Supreme Court of the United States, *Loyd vs. Scott*, 4 Pet., 205; in New Jersey, *Brolasky vs. Miller*, 1 Stockt., 807; in Maryland, *Niff vs. Blizzard et al.*, 6 Gill & Johns., 18.

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It may be contended that this mortgage, not being usurious by the laws of the state of Wisconsin, is to be governed by the *lex rei sitæ*. This case does not come within the principle announced in *Chapman vs. Robertson*, 6 Paige, 627, the mortgage in that case having been executed in the state where the property was situated, and not where the contract was initiated. In this case, the contracts were made and the mortgage executed in the state of New York, by the laws of which state it is void, and comes within the rule that being void at the place of its inception, it is void everywhere. *Houghton vs. Page*, 2 N. H., 42.

By the Court, PAINE, J. The authorities cited by the respondent fully establish that the defense of usury is not sufficiently alleged in the answer of the appellant. The rule is well settled, that the facts must be set forth with certainty, so that the court can see that they amount to usury, and what was the amount of the usurious interest. But, although it was not raised by counsel, the question has occurred to us whether, under the present system of practice, a defect in this respect is to be reached by demurrer, or whether the only remedy is by motion to make the pleading more definite and certain. As a general rule, the latter is undoubtedly the only course. But the question is whether the rule in regard to alleging usury is so strict, that defects in respect to certainty should be held matters of substance, to be reached by a demurrer. It was frequently held, under the old system, that no evidence could be given under a pleading containing only general allegations of usury; 8 Paige, 458–9; and the chancellor there intimates that it is matter of "substance." We have found no case since the adoption of the code alluding to the point, except that of *Gould vs. Horner*, 12 Barb., 601, in which the answer was held defective in this particular. It was claimed that the opposite party should have objected to it, as "uncertain and indefinite;" but the court held that be-

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cause the pleadings were put in before this power of moving to make pleadings more definite and certain, had been adopted in the code, therefore the party was not bound to resort to that; implying that if the pleading had been put in after this provision, he would have been. But without determining whether if the only defect was a mere want of particularity, it could be reached by demurrer, we think the demurrer must be sustained here, for the reason that the answer itself alleges that under its alleged usurious agreement, the sum of $20,000 was actually advanced by the respondents. The mortgage being for that exact sum, and drawing only legal interest, this allegation would seem itself to refute the general allegation of usury, and render the pleading defective in substance.

But it was assumed by the counsel for the appellant, that the answer may be amended; and the right was said to have been conceded by the other side, in the court below. In support of the right, the case of *Catlin vs. Gunter*, 1 Kern., 368, is referred to. The court there held, that where an immaterial variance occurred between the facts proved, and those alleged in the answer setting up usury, it should be disregarded, under the positive provisions of the code. But they state that previously the law would have been otherwise, and they expressly distinguish the case from one where the party was asking some "indulgence" from the court. In the subsequent case of *Gasper vs. Adams*, 24 Barb., 287, it was held that a party could not amend a defence of usury after judgment on a report of referee, without consenting to let the judgment stand for the amount actually due. We have no doubt of the power and duty of the court to allow an amendment of any pleading "in furtherance of justice, and upon such terms as may be proper;" but where a defense of usury is sought to be amended, there may be a question whether it is not "in furtherance of justice," to require the party asking

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it, to submit to the payment of what is justly due. We have felt it necessary to pass upon the question whether the answer may be amended, because if it could not, having decided that the demurrer must be sustained, it would be unnecessary to determine any of the other questions made on the argument.

Holding that it may be amended, we will proceed to determine them. And, in the first place, we have no doubt that this contract is to be governed by the laws of New York. The general rule that contracts are to be governed by the law of the place of performance, is too well settled to require the citation of authorities. Under this, it has frequently been held that contracts for the payment of money, made in a state where the interest reserved would be illegal, are still valid, if it is payable in another state, where the interest is legal, there having been no intent to evade the laws of the state where the contract was made. And on the other hand, such contracts have been held illegal, although perfectly valid by the law of the state where made, if payable in a state where they would be void for usury. The authorities upon the subject are referred to in Story's Conflict of Laws, and the whole subject very fully discussed from sec. 280 to sec. 320.

But there are some cases which hold that a contract made in a state where it is valid, but to be performed in another, where it would be invalid, may after all be held valid by referring it to the law of the state where made. The case of *De Pean vs. Humphreys*, 20 Martin L. R., 1, and *Chapman vs. Robertson*, 6 Paige, 627, are the leading authorities in favor of this position. And the same view is supported with much force in the opinion of this court, in the case of *Fisher et al. vs. Otis et al.*, 3 Chand., 83. Whichever way this question may be finally settled, I think it must depend on which law is held applicable to the contract itself, and not merely on the question whether the security, if considered alone, would be valid by the law of the state where the lands lie. I think

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there is great force in the position of Judge Hubbell, that the principles of law upon this subject are based upon the presumed intention of the parties. And this being so, the fact that security is given upon lands in a state where the contract would be valid, may perhaps have much influence in determining what that intention was. But if this circumstance alone, or in connection with the fact that the money may have been actually loaned, and the whole contract executed in the state where the lands lie, though the money is to be repaid in another, shall be held sufficient to show that the parties intended to be governed by the law of the state where they acted, then that law should be held to govern the contract, not only there, but everywhere. If a loan is made here and a note given payable in New York, and security given on lands here, and those facts should be held by our courts sufficient to make our law applicable to the contract, then they should have the same effect in a suit on the note in New York, and it should be sustained there, even though invalid if governed by their law. The rule upon this point should be uniform and certain, and the same law applied to the contract everywhere, and not one law in one place and another in a different place. Justice Story in his work before cited, thinks the case of *Chapman vs. Robertson*, cannot be sustained upon the grounds upon which it was placed by the chancellor. If it was intended in that case to decide that the security could be enforced in New York merely because the lands were there, while conceding that the law of England was properly applicable to the contract, to which the security was incident, and made it void, then I do not see how it can be sustained. But I do not so understand the decision. On the contrary, I understand the chancellor to rely on the facts that the mortgage was actually executed in that state, upon lands there situated, and that the mortgagor resided there, the mortgage itself also containing a covenant for the payment of the money, which

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is treated as the principal contract, and that the money was to be used by the borrower in that state, to show that the contract itself was taken out of the general rule, as to the place of performance, and should be governed by the laws of New York. I understand him to assert distinctly that it should be enforced in the English courts if suit had been brought on it there, notwithstanding, if governed by their law, it would have been void. And with this view I think its principle may be sustained. It does not attempt to hold one law applicable to the security, while conceding that another is applicable to the contract; but relies on the facts mentioned, to take the contract itself out of the rule that the law of the place of payment must govern. And I am not prepared to say that such facts do not furnish solid grounds for making the exception. The place of payment may, in the absence of any more controlling circumstances, be sufficient to show that the parties intended to refer their contract to the law of that place. But if the loan was actually made in another state, the money to be used there, the parties residing there, the security given there, and if by that law the contract would be valid, and it would be invalid by the law of the place of payment, these facts may well be held to have a stronger influence in showing the intention, than the mere place of payment, and the rule itself resting upon that intention, where the intention is rebutted the rule should cease.

This view is taken in a recent well reasoned opinion, by Justice Gholson, recently elected to the supreme bench of Ohio, but then judge of the superior court of Cincinnati. It was in the case of *Atwater vs. Rœlofson et al.*, reported in 4 Am. Law Reg., 549. A loan was made in Cincinnati, and notes given, payable in New York. They bore ten per cent. interest, valid by the law of Ohio, but invalid by the law of New York. Security was also given on lands in Cincinnati. The court held the contract governed by the law of Ohio.

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And in examining the question upon principle, some important suggestions are made, which I have not seen elsewhere. They were, 1, that the use of money is worth more in some states than in others; that the laws of each state fixing the amount of interest that may be taken, should be held to determine the value in that state, and that therefore when a loan is made in a state to be used there, and the interest reserved is legal there, the law of that state should determine its validity, even though, for their convenience, the parties have made it repayable elsewhere. Another suggestion is, that the mere writing by which the repayment of a loan is secured, does not evidence the whole contract or transaction between the parties, and therefore does not disclose the entire place of performance. Thus, in that case, the contract was to loan, and the lender performed his part of it in Ohio; so that the place of performance was partly there and partly in New York. And upon these grounds the court held the law of Ohio applicable. But it is expressly conceded that if the contract had been made in Ohio, for a loan to be made in New York, the money to be used there, and to be repaid there, with interest at ten per cent., it would have been invalid. It was said that such a contract would stand on the same footing as one executed wholly in New York.

I have thus referred to these cases which establish the only exception to the general rule, that the law of the place of payment is to govern, to show that none of them sustain the position, that where a loan is made between parties residing in one state, the money to be used there and repaid there, the mere giving of security upon lands in another state, can withdraw the contract from the operation of the laws of the state where made. The case of *De Wolf vs. Johnson*, 10 Wheat., cited by the respondent, holds expressly that it cannot. And if it cannot withdraw the contract, we know of no case showing that the security which was merely incident to the debt,

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should be enforced by the courts of the state where the land was situated, while conceding the debt itself to be void. And we do not think such a position can be sustained upon principle.

In this case the parties all resided in New York, the loan was made there, the money used there, and to be repaid there, and the laws of that state must govern the contract as to its validity and effect.

But the further question is made whether the appellant, being a subsequent purchaser of the property, is entitled to avoid the prior incumbrance on the ground of usury. It was discussed on both sides, as though this should be determined by the established rule on that subject in New York, if indeed any rule is established. The respondents claim that according to the New York decisions, and the decisions of other courts, such subsequent purchaser cannot take advantage of usury in a prior mortgage. The appellant claims that this rule includes only purchasers of the equity of redemption merely, who buy subject to the incumbrance, and does not extend to those who buy the property itself, with a view to avoid the incumbrance. After carefully examining the cases cited, we have come to the conclusion that the latter is the true rule.

We shall not attempt a review of the numerous cases on the subject, but it is expressly held that a purchaser generally from the mortgagor, and not of the equity of redemption merely, may avail himself of usury in a prior mortgage, in *Brooks vs. Avery*, 4 Com., 229. And we think there is nothing in the subsequent case of *Sands vs. Church*, 2 Seld., 347, or in any of the other cases cited, where subsequent purchasers were prohibited from setting up this defense, in conflict with this decision. They were cases where the purchaser had bought the equity of redemption merely. And the very grounds upon which they were excluded, imply that one who

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purchases generally, and not subject to the prior incumbrance, would not be excluded. They say, *first*, that the debtor can waive the forfeiture if he sees fit; and if he sells, subject to the incumbrance, that affirms it, and amounts to a waiver They say again, that where the purchaser buys subject to it, he thereby agrees that it shall be paid out of the property, and cannot afterwards be heard to object to it, and upon this, and not on the personal character of the defense, the judge rested his opinion in *Sands vs. Church*. They say, further, that to allow such a purchaser to set up this defense would not benefit the borrower, but would only transfer the money from the pocket of the lender to that of the purchaser. None of these reasons exist in case of a purchaser, not subject to the incumbrance. There the grantor does not waive by selling subject to it, but by selling generally, as though the incumbrance was void, clearly insists on the forfeiture. The purchaser does not recognise it. And maintaining this right on the part of such a purchaser *is* benefiting the borrower, because it enables him to sell his property and treat the incumbrance as void, as the statute declares it. To hold otherwise would, as the chancellor suggests, in *Shufelt vs. Shufelt*, 9 Paige, 145, leave the property "to a certain extent inalienable in his hands."

The answer here sets forth a purchase of the property generally, and that the defendant was informed by the grantor of the usurious character of the prior mortgage, and relied on being able to avoid it. It also avers that he gave a mortgage of $9,000 for part of the purchase money, to which amount the mortgagor is still interested. We must hold, therefore, that the defendant is entitled to avail himself of the defense of usury against this mortgage, if usury existed.

The only other question discussed was, whether it was necessary for the appellant to offer to pay the principal sum loaned. The respondent's counsel contended that such offer

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was nessary under section 6, chap. 61, R. S., 1858, which was in force when these pleadings were made up. Even if this statute were held applicable to the case, yet we have decided in the case of *Platt vs. Robinson, supra*, 128, at this term, that it did not require an allegation of tender in the pleading, but only that it should be proved before the party should have the benefit of the plea. Under that decision, therefore, the want of such an allegation or offer to pay the principal would be no ground of demurrer. But as the parties desired a decision of this question on its merits, we will state the conclusion to which we have come. That is, that this provision of our statute is not applicable to a case of this kind, but was only intended to apply to contracts made under our law, by which the usurious security is valid for the principal loaned. Having enacted this in section 4, it was very naturally followed by the provision that the party should tender the principal. It is true, the language of section 6 is broad enough to cover all cases of usury. But, we think it must be construed in connection with the other sections, and that it was evidently designed to include only cases arising upon contracts to which that act was applicable, and not to disturb the general rule that contracts depending for their validity and effect upon the laws of other states must be determined by those laws everywhere. The language of section 4 is equally comprehensive. It says "all bonds, notes," &c., shall be valid to secure the principal. But no one would construe this as intended to include such instruments executed in other states, under other laws. And we think section 6 falls within the same principle. To hold otherwise would be to suppose that the legislature while legislating for this state intended to include transactions occuring in other states, and to provide that although contracts made in such other states were void by their laws, yet that in this state they should be valid to a certain extent. This would be a substantial repeal of the

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general rule above referred to, which we think was never intended.

In *Gale vs. Eastman*, 7 Met., 14, it was held that no deductions could be made under the law of Massachusetts on a usurious note executed in New Hampshire, and governed by its laws. The court says: The law of this commonwealth declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs when suits are brought what deductions shall be made; but it is suits brought on *such* contracts, that is, contracts made in violation of its own provisions." Such we think was clearly the intent of our statute, and it is no answer to say that this is merely a part of the remedy, which is always governed by the *lex fori*. To apply it to a usurious contract made under the laws of New York, would make it something beyond a mere remedy, and give it the effect of determing the validity of the contract itself.

The counsel for the respondent relies on the decision that the New York law prohibiting corporations from setting up the defense of usury, was applicable as well to usury arising under the law of England, as to that under the law of New York. The remarks of the judges in *Curtis vs. Leavitt*, 15 N. Y. Rep., 9, would seem to go to that extent. But as the law of England, like that of New York made the contract void, there was no occasion for the court to notice any distinction. The corporation in that case was also a domestic one, and there was no question that it was intended to be reached by the law. This decision alone we should not regard as necessarily conflicting with the views we have taken. But in the subsequent case of *Ins. Co. vs. Packer et al.*, 17 N. Y. R., 52, the same rule is approved, and the court go further and hold that it would apply to foreign corporations, litigating in the courts of that state. I admit that these two decisions taken together seem in conflict with our conclusion. They

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would seem to show that if an English corporation should be sued in New York by an English citizen, on an English contract, that the corporation could not show it usurious and void by the law of England. But I think that is carrying the application of local law farther than either authority or principle would warrant. It could not be supported by the rule that no country is bound to enforce contracts or agreements made in other countries, by which it would violate its own public policy. It could not well be said that the public policy of New York could extend to affect contracts made between citizens of another country, and the execution of which could only affect the rights or interests of the citizens of that country. And to say that the law of New York should in such a case prevent the defendant from showing the contract void by the law of the country where made, seems to be no less than a repeal of that general and essential rule that a contract valid where made is valid every where, and if void where made is void every where. It would be making a contract where none existed before. It would be saying to the citizens of other countries who had violated its laws, that if they could sue in New York, their illegal contracts should be enforced. It may, perhaps, be competent for the legislature of any state to make so serious an inroad upon the general principle referred to. It certainly has entire control over the remedy. But it would seem to be going great lengths to say that it may determine the validity and effect of contracts between the citizens of other countries, and make those valid that were void, and those void that were valid. To indicate such an intention the language should be unmistakable, and certainly no ordinary law, purporting only to establish a rule for the state where made, should be stretched to an attempt to legislate for other countries. Nowithstanding these cases, we are, therefore, still of the opinion that our statute was designed only to regulate the effect and validity of contracts

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made under it, and not those made under the laws of other states.

Was the defendant bound to offer the principal, under the established rule in New York? We think not. It was a well settled rule in their courts of equity, that where a a party had to resort to the aid of a court of equity, to avoid a usurious contract, they would compel him to do equity, and pay the principal. But where he was a defendant, the other party having resorted to the court to enforce the security, this rule did not prevail. He stood there on his legal right, and if he could set up and prove the usury, without the aid of the court, it was bound to declare the contract void. *Fanning vs. Dunham*, 5 J. C. R., 122; *Livingston vs. Harris*, 3 Paige, 528. The statute which changed this rule as to the borrower, where he filed his complaint, evidently recognizes this same distinction. For it was clearly its design to place him in the same situation where he proceeded affirmatively, as he would have before as defendant. If the previous rule had required him to pay as a defendant, the statute would undoubtedly have changed that also. We think, therefore, if the defendant had set up a good defense of usury, and been able to support it without the affirmative aid of a court of equity, there was no law requiring him to tender the principal.

But in his answer the defendant alleges an incapacity to aver the defense with that certainty and particularity requisite, and asks that the plaintiffs may be examined. By the code the action for a discovery is abolished, and it provides that every party may be examined as a witness. § § 54, 55, chap. 137, R. S., 1858. Can a party, under this provision, be examined for the purpose of eliciting facts to enable the opposite party to plead? The only case we have found where the question is suggested, is that of *Chichester et al. vs. Livingston et al.*, 3 Sand., 718, and there the court say, "it has been

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thought by some," that such examination might be had. If it can be had, is an application for such an examination, such a resort to a court of equity for affirmative aid, under the law as it exists, as should bring a party within the rule requiring payment of principal? And further, can a party be compelled to testify, when the effect of his evidence would be to subject him to a forfeiture? In the case of *Livingston vs. Harris*, 3 Paige. It was held that he could not. In the case of *Cooper & Staines vs. Tappan*, 4 Wis., 371, the question is alluded to, and it is said that the defendant in such a case, "could not, perhaps, have been compelled to answer that part of the bill which sought a discovery of the alleged usury." The same case was again before us at the present term, 9 Wis., 361, and the point was suggested, but as the defendant had voluntarily answered, we thought it not involved.

We have thus, at the desire of counsel, though determining the demurrer on the ground first stated, passed on the other material questions discussed. A decision of the question last stated, as well as of the one previously suggested, as to the terms upon which an amendment should be allowed, may be essential to a final determination of the case; but as they were not argued, and are important in themselves, we shall leave them for decision as they may arise.

The order sustaining the demurrer is affirmed, with costs, and the cause remanded for further proceedings according to law.

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FISHER *vs.* HORICON IRON & MAN. CO.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard October 27, 1859.] [Decided January 4, 1860.

Constitutional Law—Corporations—Mill Dams.

When the Supreme Court of the state had decided that the "act concerning mills and mill dams," was constitutional, and rights and interests have grown up and become vested under the law as then construed by the court, the court will now adhere to that ruling, although all its members may be of opinion, if it were a new question, that the decision should have been against the constitutionality of the act.

A corporation is a person within the meaning of the mill dam act, and entitled to the rights granted under its provisions, as a franchise, and can claim the protection of the act.

The case of *Newcomb vs. Smith*, 1 Chand., 71, considered and followed.

This was an action commenced by Lucius G. Fisher against the Horicon Iron and Manufacting Company, for damages in the construction of a dam across the Rock river at Horicon, whereby the waters of the river were made to overflow five hundred acres of lands of the plaintiff. The answer of the defendant set up as a defense: 1. The act to authorize A. G. Ellis and others to erect a dam at the place where this is erected, approved March 9, 1839. 2. The "act in relation to mills and mill dams," approved January 13, 1840. 3. The "act to incorporate the Horicon Iron and Manufacturing Company," approved March 15, 1854; by all of which the defendant was authorized to maintain the dam and to flood the land in question. That at the time of the passage of the several acts, and the construction of the dam, and the overflowing of the same, the lands belonged to the United States, or to the state of Wisconsin, as swamp and overflowed lands. That they were overflowed at the time the plaintiff purchased them; and that he had never demanded compensation for the damages. To this answer the plaintiff demurred generally, and the court sustained the demurrer; from which the defendant took this appeal.

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E. G. Ryan, for the appellant, relied upon the mill dam act. *Pratt ss. Brown*, 3 Wis. 603; *Newcomb vs. Smith*, 1 Chand., 71; *Stoughton vs. The State*, 5 Wis., 291; *Dick vs. Webster*, 6 Wis., 481; *Bonaparte vs. Cam. & Amboy R. R. Co.*, Baldwin, 205.

Mat. H. Carpenter, for the respondent, cited 1 Bl. Com. 139; 2 Kent. Com., 399; *Gardner vs. Newburgh*, 2 J. C. R., 161; *Shepherdson vs. Mil., B. R. R.*, 6 Wis., 613; *Thien vs. Vœgtlander*, 3 id., 461; *Newcomb vs. Smith*, 1 Chand., 71; *Stevens vs. Marshall*, 3 id., 222; *Pratt vs. Brown*, 3 Wis., 603; *Cushman vs. Smith*, 34 Me., 277.

By the Court, Cole, J. The principal question discussed by counsel in this case was, the constitutionality of the law commonly called the mill dam act. If that law, and the special acts referred to in the answer are assumed to be constitutional, it would seem to follow, as a necessary consequence, that this action cannot be maintained. For these statutes expressly take away the common law remedy for damages occasioned by the erection of dams, and flowage of land, and substitute a statutory remedy, provided in the acts themselves. Hence the main question, which we were invited to consider, is, the constitutionality of the mill dam law. This question we cannot regard as open for investigation and discussion at the present time. It was fully and carefully considered by the supreme court, under its former organization, in the case of *Newcomb vs. Smith*, 1 Chand., 71, and the constitutionality of the law affirmed.

In the case of *Stevens vs. Marshall*, 3 Chand., 222, which brought up for review questions growing out of the repeal of the mill dam law, and the rights of parties acquired under it, the same court referred to the decision of *Newcomb vs. Smith*, as establishing the constitutionaity of the law, and adhere to the construction there given to it. In the case of *Pratt vs. Brown*, 3 Wis., 603, this court, without passing directly upon

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the constitutionality of the law, overruled the case of *Stevens vs. Marshall*, as to the effect of the repeal of the law, deciding that the act was at all times subject to repeal; that the rights of those holding under it continued no longer than the act itself, and that the right to overflow the land of another did not vest in perpetuity in the mill dam owner. But as the mill dam law had been repealed, the case did not call for any adjudication upon its constitutionality, and none was had. In 1857, the legislature re-enacted the law, and the appellant claims the protection of its provisions, as well as of the special enactments set up in the answer.

We are free to confess that if the question as to the constitutionality of the mill dam law were now for the first time presented to this court, and we were not embarrassed by former adjudications upon it, we should doubtless come to a different conclusion upon the question, from that arrived at by the majority of the court in *Newcomb vs. Smith*. It does appear to us to be going a great length to say that land which is used for the purpose of overflowage by a mill dam is appropriated to a "public use," in the proper and just sense of those words; nor does the law seem to provide the constitutional compensation for the land thus taken and appropriated, which it should. The only ground upon which the taking of the property can be justified is, that mills are a great public convenience, almost a necessity; and that every person or corporation which avails itself of the franchise given by the act, must take it with the resultant duty of operating the mill for the public, or any individual. Such undoubtedly would be the construction given this law, otherwise it could not be sustained for a moment. We make these remarks not for the purpose of provoking discussion, but in justice to our views, and to indicate the serious objections which we think exist to the law, while at the same time we state a few reasons

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which constrain us to adhere to the decision already made upon it.

The case of *Newcomb vs. Smith* was decided at the January term, 1849. Since then, it is fair to assume, large amounts of capital have been invested, and most important rights acquired in mills and water powers, under the impression that the decision in *Newcomb vs. Smith* would be adhered to by the courts of this state, and that the power of the legislature to pass a mill dam law, and other similar enactments, would not be denied by them, when called in question in future controversies. And, although the period has been comparatively brief since the case of *Newcomb vs. Smith* was decided, yet we all know that within that time enterprising towns and flourishing villages have grown up, whose wealth and prosperity are mainly dependent upon their hydraulic power, and whose business relations and industrial resources would be seriously affected, if we were now to overrule that case. Considerations of this nature, relating to questions of property acquired under the belief that a former decision was correct, cannot be disregarded, when we are called upon to set such decision aside. The rule *stare decisis*, has great force in such a state of things, and emphatically applies. We do not over look the fact that the mill dam law of 1840 was repealed in January, 1850. As already observed, the law has since been re-enacted, while various laws have been passed by the legislature from time to time, authorizing companies and individals to keep up and maintain dams, which special acts contain provisions substantially like those in the old mill dam law.

The appellants, in their answer, set up and rely upon the act of March 9th, 1839, Sess. Laws, 1838–9, p. 98, authorizing the persons therein named to erect a dam at the point where the dam complained of, was in fact erected, as well as the act of incorporation, chap. 133, p. 186, Private Laws, 1854,

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authorizing them to purchase and maintain this dam, then erected, and providing a remedy in the event of the dam causing the water to flow upon lands other than those belonging to the company. Section 7. This shows what legislation has been had, and what transactions have taken place on the strength of the former decision in *Newcomb vs. Smith*, and other like cases, might be given.

We are now asked to depart from that decision. Ought we to do it? I think not. It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits, and the community has a right to expect, with confidence, we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally every six years, and if each change in the organization produces a change in the decisions, and a different construction of laws, under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious. For these and other reasons which might be given, we decline to reconsider the constitutionality of the mill dam law.

An objection was taken, that the appellant, being a corporation and not a "person," within the meaning of the mill dam law, was not entitled to the franchises and could not claim the protection of this act. If this construction of the general law, chap. 56, R. S., 1859, were sound, and we do not think it is, still, the objection would fail when applied to the act of incorporation, which distinctly authorizes the appellant to purchase and maintain this dam.

The conclusion at which we have arrived is, that the answer does state facts sufficient to constitute a defense to the action, and therefore the demurrer to the same was improperly sustained. *Thien vs. Vœgtlander*, 3 Wis., 461.

The order of the circuit court sustaining the demurrer is reversed and the cause remanded for further proceedings.

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CLASON et al. *vs.* SHEPHERD et al.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard June 30, 1859.] [Decided January 4, 1860.

Mortgage—Foreclosure.

Where the owner of a first mortgage, who had been made a party defendant in an action to foreclose a second mortgage, and charged as a subsequent incumbrancer, and an order *pro confesso* taken against him, entered into a written stipulation with the plaintiff, to allow the latter to go on and sell under his decree, without prejudice to his right, and that he might file his answer and present his defense, as though no order *pro confesso* had been entered against him; and such defense is found in his favor: Held that the plaintiff has thereby waived all right to insist upon the decree and sale as a bar to his prior claim.

The agreements of parties litigant will be carried out by the court, even though it do cause irregularity in the form of entering the judgment in the cause.

Though a party to a foreclosure suit, holding a prior mortgage, stipulate that a sufficient sum of money to satisfy his claim be considered as in court, and that the plaintiff may go on and sell the premises, such a stipulation does not debar the prior mortgagee of his right to proceed to judgment, nor release his lien upon the mortgaged premises.

After this case was remanded to the circuit court, according to the order made and reported in 6 Wis., 369, where the facts are fully stated, it was referred to the clerk of the court to ascertain the amount due on the bond and mortgage to the defendant Lyness. After which the court entered a judgment based upon the stipulation to allow the plaintiffs to enter their judgment *pro confesso*, and then to allow the defendant to contest his right to priority as a mortgagor, that the mortgaged premises be sold to pay off the mortgage to Lyness. From that judgment the plaintiffs appealed.

Lakin & Steever, for the appellants.

J. H. Paine & Son, for the respondent.

By the Court, Dixon, C. J. We agree entirely with the appellant's counsel when he says this is truly an anomalous

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case; but cannot concur with him in saying that the judgment of the circuit court must be reversed, for the sake of preserving order and regularity in legal proceedings. If the case was likely to become a precedent for future ones, we might be disposed to give more weight to that branch of his argument; but we do not think it is. It is out of the ordinary course of legal proceedings, and hence any arguments to be drawn from thence, are very unsafe and inconclusive. The question is not whether according to the usual mode of proceedings two or three judgments may be entered in the same action for or against the different parties; but whether according to the stipulations and conduct of the parties before the court, such judgments are warranted in this action. We think they are, and that the judgment appealed from must be permitted to stand.

The purpose of the parties to leave Lyness in full possession of all his rights, under his mortgage, notwithstanding the rule, under the first decree, in case he should be adjudged to have a prior lien, fully appears from the first clause of the stipulation, which provided that the appellants might go on and sell under their decree, "without prejudice, and that the defendant Lyness might file his answer and prosecute his defense, as though no order *pro confesso* had been entered against him." What language more expressive than this for the purpose of saving to Lyness all his rights, notwithstanding the decree and sale, could have been used? And in what way could the appellants have more effectually waived all right to insist upon the decree and sale as a bar to his claims? We confess our inability to see how such an agreement could have been more plainly and unequivocally expressed. Although the first decree purports on its face to be an absolute bar to the rights of Lyness, yet no one can doubt that the appellants could have waived their rights, under it, and consented that it might be *pro tanto* opened,

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without having it absolutely set aside or vacated, particularly by a stipulation in the action, which is attached to, and becomes a part of the judgment roll. Decrees and judgments are not of so high and absolute a nature that the parties interested may not vary or release their rights under them, and if they do so by proper instruments, it is not for courts to say that the agreements shall not be carried into effect, or abided by, because it may disturb the "peace and harmony" of the record. The rights of the parties are not to be overlooked or disregarded, to subserve any such trifling purpose. If the parties see fit so to conduct their litigation that it requires two or three judgments, in the same action, to carry out their agreements made with the consent of the court, and to meet the ends of justice between them, we can see no reason why either should be permitted to set up the irregularity of the proceedings to which he was a party, for the purpose of cutting off or defeating the rights of the other Their agreements, uuless illegal, or contrary to public policy, is the law by which their rights are to be measured and determined.

Because, in the latter part of the stipulation it is stated that a sufficient sum of money to satisfy the claim of Lyness, in case the court decided in favor of the priority of the lien of his mortgage was to be considered in court, and because the defendants covenanted to hold themselves responsible for all moneys adjudged to him in the cause, it is contended that he is not entitled to proceed by judgment of foreclosure and sale to satisfy it. The reason urged is, that the stipulation shows that he relied on the covenants and personal responsibility of the appellants, as a security for the payment of his debt, in case he finally succeeded in the action. This position is untenable, because by such construction of the stipulation the first clause is deprived of all force and efficacy, and is wholly annulled. The agreement is to

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be so interpreted as to give effect to all its parts. Although he relied upon the personal responsibility of the appellants, did he rely upon that alone? Clearly not. He rested as well on his right to proceed to the judgment and sale given by the first clause.

The objection that the answer does not ask the relief granted, is purely technical. The prayer lays a substantial foundation for such relief. The facts disclosed by the record are not such as to induce us to draw any nice distinctions for the sake of sustaining the appellants in the course which they have pursued in this case.

The judgment of the circuit court is affirmed with costs.

PAINE, J., took no part in the decision of this case, having been of counsel.

HASKINS *vs.* LUMSDEN et al.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 2, 1859.] [Decided January 4, 1860.

Libel—Evidence.

Evidence of the existence, at and before the time of the publication of a libel, of common rumors and reports, to the effect that the plaintiff was guilty of that with which he was charged in the libel, which rumors and reports were before the publication communicated to the publisher, are inadmissible in mitigation of damages in an action of libel, where the libel does not state or refer to such rumors or reports, or refer to them as authority for the publication.

Reports and rumors, if received in evidence in an action of libel, must be received either in diminution of damages, by showing the plaintiff's previous character to have been bad, or to repel the presumption of malice on the part of the defendant.

This was an action for libel, brought before the code took effect, by Joseph W. Haskins, against Samuel Lumsden, Wil-

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liam G. Halpin, and Edward Kennibeck, for publishing a handbill, headed "*Jackson Hadley*," and addressed to "Democrats of the first district of Wisconsin, and Irishmen and Germans in particular," which was published by the defendants the evening preceding the general election of 1856, at which election Hadley was a candidate in that district for member of Congress. The plaintiff counted upon that portion of the handbill which read as follows: "Are the people aware of his combinations with J. W. Haskins, (when Hadley and he kept the chequered ware-house, on the river,) and Hadley's brother-in law, Hopkins, for the sale of unclaimed goods, fixed so as to have them unclaimed, and instantly removed, when got out of a propeller, sloop, or steamer, to a place of security, for fear they would be claimed; and ten thousand dollars worth of such unclaimed goods, and the money divided and pocketed, at the store, No. 57 East Water street, Milwaukee, and the store rented for that purpose; and when all was sold out, in Hopkins' name, 'to be let,' on the store, ever since." "Judgment debts to many thousand of dollars hang over the head of J. W. Haskins, another professed democrat, and a tool and partner in infamy with Hadley."

To this declaration the defendants pleaded, first, the general issue, and second, the truth of the statements; and the plaintiff replied, denying the truth. On the trial, the plaintiff proved the publication of the handbill by the defendants, and rested. The defendants then called a witness, and asked him the following questions: "Were there any common reports, in the year 1856, in relation to the plaintiff, in connection with Hadley and Hopkins, as to the honesty and integrity of the plaintiff in conducting the ware-house business, commission and storage, in the city of Milwaukee?" "Were there, in the fall of 1856, in the city of Milwaukee, any public and common rumors in regard to the want of integrity of J. W. Haskins, the plaintiff, in his connection with Jackson Hadley and O. B. Hopkins, in conducting the chequered ware-house, on the Milwaukee River, in which they were engaged as a place to receive and dispose of unclaimed goods, and in such a manner as to have the owners and consignees of goods designed for said ware-house, suppose the same were not received, so as to have them unclaimed, and then bring them off to No. 57 East Water street, or some other place which they kept for that purpose, to be kept and disposed of as unclaimed, and in that manner to cheat and defraud such own-

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ers and consignees, and to divide and pocket the money arising therefrom?" "And did you communicate such rumors to the defendants, or either of them, before the time of the publication?" Both of which were rejected by the court, and the jury, under the instructions of the court, found for the plaintiff $1,000, on which judgment was rendered, and the defendants appealed to this court.

J. Downer and J. E. Arnold, for the appellants, cited the following authorities: Sedgwick on Meas. Dam., 453 to 469; Starkie on Slander, Vol. 1, p. 219 to 226; *Underwood vs. Parks*, Strange, 1200; *Leicester vs. Walter*, 2 Camp., 251; ——— *vs. Moor*, 1 Maule and Sel., 284; Starkie on Slander, (2d ed.,) with notes by Wendell, Vol. 2, p. 90 to 96, and notes; *Kennedy vs. Gregory*, 1 Binney, 85; ib., 90, 92, n.; *Calloway vs. Middleton*, 2 A. K. Marshall, 372; *Hyde vs. Baily*, 3 Conn., 466; *Williams vs. Miner*, 18 Conn., 474; *Buford vs. McCord*, 1 Nott and McCord, 268; *Rigdon vs. Wolcott*, 6 Gill and Johns., 413; see also 1 Blackf., 369; 3 Ham., 270; *Dewitt vs. Greenfield*, 5 Ohio, 225; *Reynolds vs. Tucker*, 6 Ohio State, 516; *Gilman vs. Lowell*, 8 Wend., 578; *Bushnell vs Prosper*, 1 Kern.' 357.

Palmer & Stark, for the respondent.

By the Court, Dixon, C. J. Although the appellant's counsel makes several points in their brief, yet as only one was insisted upon in argument, and as the others seem clearly untenable, we shall dispose of the case with reference alone to the point argued. The question may be stated thus: Is evidence of the existence at and before the time of the publication of a libel, of public and common rumors and reports to the effect, that the plaintiff was guilty of that with which he was charged in the libel, which rumors and reports were before the publication communicated to the publishers, admissible in mitigation of damages in an action against them, where they assume to assert the charge themselves, without stating the existence of such rumors or reports, or referring to them as authority? Though amid the various and conflicting decisions to be found in the English and American re-

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ports as to whether rumors and reports unfavorable to the plaintiff, in actions of libel and slander, are admissible at all, and if so, under what circumstances, and for what purpose they are admissible, it is a laborious and difficult task to say upon authority what the law is upon the subject; yet after an examination of them, we say in the case before us, that both upon principle and authority, such evidence is inadmissible. The marked and just distinction which has at all times been made by the common law between slander and libel, between slanderous words *spoken*, and the same words written or printed, we think fully justifies us in holding, that in an action against the publisher, pre-existing reports and rumors of the same character of the slanderous charges made in the libel, ought not to be shown to repel the presumption of malice, where no reference is made to them in the publication, and where by the mode of statement the publisher asserts their truth, as of his own knowledge. The writing of a slander has always been regarded as a much higher offence than barely speaking it. In respect to our natural frailty and weakness, no action is given for defamatory words spoken, unless they be of the harsher kind, which impute crimes, or are directly detrimental to one's trade, profession, or calling. Words of milder character are considered as mere passing detraction, without substance sufficient to injure or affect the reputation. The reason of the rule, however, ceases when the words are written or printed. They cannot then be deemed the result of sudden passion, or a disposition to trifle, but must be regarded as evidence of a deep and lasting hatred, and a desire permanently to malign and injure. The writing or printing is a deliberate act, and the publication becomes a permanent injury and mischief. What was before mere abuse or reproach, becomes a well advised and permanent accusation. For words written persons are punishable by indictment, as well as by civil action, which is not the

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case with mere oral slanders. In view of this distinction, we think it would be unreasonable and improper to admit evidence of the existence of the lesser offence, in extenuation of the damages sustained by the commission of the higher, in a case like the present. It may well be doubted whether a defendant ought, under any circumstances, to have a per centage carried to his credit on account of the injuries which the plaintiff's character had previously sustained from slanderous rumors and reports, as a reward to him for the labor of having transformed them from the soft and perishing medium of words spoken, to the solid and durable currency of words written or printed. We do not, however, wish to be understood as expressing any opinion outside of the facts of the present case, or as saying that such rumors might not be proved, to rebut the presumption of malice in a case where the charge is made because of them, and referring to them as authority, or where it is simply asserted that such rumors and reports prevail, without at the same time asserting a belief in their truth. Such cases would present a very different question from the present, and it will be time enough to decide them when they actually arise.

Here, however, the defendants make the charge their own, and give it a new and permanent form of existence, which it had not before. The offence of which they are guilty, is one which did not before exist. The offer by the defendants to prove the existence of the rumors *in mitigation of the damages*, is an admission on their part of the falsity of the accusations; and is not the guilt of him who deliberately prints and publishes of another slanderous words previously spoken, though not by himself, equal in degree with that of him who invented and first spoke them? Our perceptions of the different degrees of moral turpitude or wrong are not sufficiently nice to enable us to discover the difference. If there be any, we should say that the balance, in a moral point of view, is

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in favor of the speaker, instead of the printer. The malice to be implied from the act of printing and circulating in that form, is certainly equal to that implied from the mere speaking. None of the authorities cited by the appellant's counsel go to the extent of admitting this evidence. In order to a proper understanding of them, it must be remembered that there is a broad distinction between proof of *facts and circumstances* within the knowledge of the defendant, which go to disprove malice, by showing that he, through mistake, believed the charge true when it was made, and proof of rumors or reports of the truth of the charge, or mere information derived from credible sources. Facts and circumstances, as spoken of in the cases, are not to be understood as including reports and rumors. These belong to another branch of defense. Much embarrassment and confusion will also be saved by its being further borne in mind, that there is a distinction between the objects for which reports and rumors may be received. They are admitted for one of two purposes only, either to diminish the damages, by showing the plaintiff's previous character to have been bad, or to repel the presumption of malice, on the part of the defendant.

Williams vs. Miner, 18 Conn., is a case where the offer was to prove facts and circumstances within the knowledge of the defendant at the time of speaking the words, which tended to prove the guilt of the plaintiff, and which the court say "might and probably did excite reasonable suspicions of guilt" in the defendant's mind, and is a fair illustration of the rule. The alleged slanderous words were, "he is a thief, and stole the hay and hayseed from Mrs. Dow's barn." The facts offered to be proved were, that the plaintiff took and converted to his own use the hay and hayseed of Mrs. Dow, without her knowledge and consent, though under such circumstances as not to amount to a larceny. The court say, that the circumstances of the taking were such as, by persons

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not legally informed, are often supposed to constitute the crime of theft, and add: "The question is, as it seems to us, if the defendant used the language imputed to her from a *knowledge*, that the plaintiff had taken the property of Mrs. Dow, in the manner stated, without her knowledge, and against her consent, and converted it to her own use, whether she should be subjected to the same extent of damages, as if her charge had been an entire fabrication and made without reasonable ground to believe it to be true? Why, upon general principles, was not this evidence admissible?" They decided as we think very properly, that the evidence was admissible. It is manifest, however, that the principles of that case have no bearing upon the one under consideration.

The case of *Bailey vs. Hyde*, 3 Conn., 463, is one where facts and circumstances were sought to be shown, by the admission of the plaintiff; and although such proof was held in general to be proper to rebut the presumption of malice, yet as the facts contained in the admission were *unknown* to the defendant at the time of the speaking, and therefore could not diminish the presumption of the malice, the testimony was held to be improper. *Rigden vs. Wolcott*, 6 Gill & John., 413; *Willson vs. Apple*, 3 Ham., 270; *Reynolds vs. Tucker*, 6 Ohio St. R., 516, are all cases where evidence of such facts and circumstances as show a reasonable ground of suspicion of the truth of the matters charged is held admissible. *Reynolds vs. Tucker*, was an action of slander for words spoken against the chastity of the plaintiff's wife, and it was held competent under the general issue, in mitigation of damages, to prove that the wife and an unmarried man had lived together alone in one house, where the knowledge of such mode of living had come to the defendant before the speaking of the words. The other authorities cited are manifestly cases where the proof was allowed for the purpose of showing that the reputation of the plaintiff was generally bad before the slan-

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der or libel, and that therefore he had suffered little or no loss of character or society by reason thereof; and not cases where rumors or reports of the same character, as those complained of, were as such admitted for the purpose of disproving malice in fact, on the part of the defendant.

In the case of *Leicester vs. Walter*, 2 Camp., 251, the proposition of the defendant's counsel was to prove "that before and at the time of the publication of the libel, there was a general suspicion of the plaintiffs's character and habits, and that his relations and former acquaintance had on this ground ceased to visit him," &c., and not to prove alone that rumors of the particular charge contained in the libel had generally prevailed at and before its publication. Sir James Mansfield, C. J., in deciding the point, says: "The plaintiff's declaration says, that he had always presented a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered the *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted."

In ——— *vs. Moor*, 1 Maule & Sel., 284, the defendant on cross-examination of the plaintiff's witness, who proved the words, was permitted to ask whether he had not heard reports in the neighborhood, that the plaintiff had been guilty of *similar* practices, (it being an action of slander imposing a specific charge of unnatural practices to the plaintiff.) The reason of allowing the evidence is given by Lord Ellenborrough, in the opinion. He says: "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished; and it is competent to show that, by evidence." The same is true of the case of *Galloway vs. Middleton, et ux*, 2 A. K. Marsh., 743. The action was brought by Middleton and wife against Galloway for uttering and publishing slanderous words, importing

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a charge, that Mrs. Middleton had, before her marriage, had a mulatto child, the wife of one Harry Butcher. The offer of the defendant was to prove that Mrs. Middleton "was generally reputed, by all the neighbors, fifteen or twenty years before, to be the mother of Harry Butcher's wife." In *Buford vs. McLuny*, 1 Nott & McCord, 268, the only question before the court was whether evidence of the plaintiff's general bad character is admissible in mitigation of damages, and the majority of the court held that it was. In *DeWitt vs. Greenfield*, 5 Ohio, 225, the decision was that evidence of the plaintiff's general bad character may be given under the general issue, in mitigation of damages, "but not of his character in any single particular." In *Henson vs. Veatch*, 1 Blackf., 369, the defendant first offered to prove in mitigation of damages that the words spoken were true, but the court following the case of *Underwood vs. Parks*, 2 Strange, 1200, and the subsequent cases in which that case has been followed as authority, held that he could not do so. The defendant then offered to prove that he had strong suspicion that the words were true; but this he was not allowed to do, and the court say, referring to *Leicester vs Walter*, that the utmost defendants had been permitted to prove was a *general* suspicion, that the charge in the libel was true. The case of *Kennedy vs. Gregory*, 1 Binney, 85, stands upon peculiar grounds, which, if they existed in this case, as we have intimated above, might lay the foundation for the introduction of the testimony offered. There the witness called by the plaintiff to prove the speaking testified, that on asking the defendant if the plaintiff was given to drink, that being the slander charged, by reason of which the plaintiff claimed to have been thrown out of employment as a school teacher, and to have suffered special damages, he answered either "it is so," or "they say it is so." The words "they say" are made emphatic in the report, and it is evident that it was because the plaintiff's

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witness left it doubtful whether the defendant asserted that the plaintiff was given to drink, or whether he simply stated that it was so rumored, that the court allowed evidence of the existence of such reports to go to the jury in mitigation of damages. These are all the authorities cited and relied upon by the appellant's counsel, and it is clear that none of them go to the extent of showing that the circuit court erred in rejecting the evidence, which the defendants proposed to give on the trial.

It did not appear in this case from the plaintiff's showing that there were any general rumors as to his want of integrity in conducting the warehouse business, which were the basis of the libelous publication, or to which it in any manner referred. The offer was not to prove that the plaintiff's general character at and before the publication was bad, nor that he was generally reputed in the neighborhood to be dishonest or suspected of a want of integrity in conducting his warehouse business, but the question was whether there were *any* common reports in relation to the plaintiff in connection with Hadley and Hopkins, as to his honesty and integrity in conducting the warehouse business, &c. The existence of unfavorable and defamatory rumors and reports is one thing, and a real loss of character and standing in community quite another. Everybody knows that such rumors and reports may be afloat without real injury or detriment to the person against whom they are circulated, and he may not for that reason feel called upon to notice or concern himself about them; but because some slanderer, whom no one believes, sees fit to gratify his malice in the harmless business of inventing and speaking them, are they to be brought into a court of justice as an excuse for him, who deliberately transfers them into a printed handbill or circular? We think not. It seems to us, within the authorities cited that the least that a defendant under such circumstances could be permit-

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ted to do in extenuation of damages would be to show that the plaintiff was a person of disparaged fame and tarnished reputation, before the publication of the libel complained of. But according to some well considered cases, he could not even do this. See *Jones vs. Stevens*, 11 Price, 235, in which ——— *vs. Moor*, and *Leicester vs. Walter*, are overruled, and in which general evidence of the plaintiff's bad character and ill repute in his business as a practicing attorney, was held inadmissible either to contradict the allegation in the declaration, that the plaintiff during, &c., exercised and carried on the business of an attorney, with great credit and reputation, with a view to mitigating the damages on the general issue, or in support of averments in the defendant's pleas pleaded by way of justification, that the plaintiff was a disreputable professor and practitioner of the law. See, also, *Downing vs. Butcher*, 2 M. & R., 374, in which *Jones vs. Stevens* was sustained.

It is unnecessary for us to inquire whether or not a defendant in a case where the charge is made as of his own knowledge, should in mitigation of damages be permitted to prove that the matters charged were communicated to him by a credible person professing to know them; or whether or not rumors and reports as to the matters charged, should be received for the same purpose where the offer of them is accompanied by an offer to prove their truth, as neither of these questions are properly raised by the record.

The judgment of the circuit court is affirmed with costs.

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SAUER *vs.* STEINBAUER.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 9, 1859.] [Decided January 4, 1860.

Mortgages.

Where upon foreclosure of a mortgage upon an instalment due and unpaid, and other instalments are to become due, the judgment is for the whole amount due and to become due, and absolute for the sale of the mortgage premises, and omits to provide that, if previous to such sale, the defendant should pay the complainant, or bring the money actually due on the mortgage, with interest and costs, into court, the proceedings should be stayed; the judgment was reversed for that reason.

The cases of *How vs. English*, 6 Wis., 262, and *Wood et al. vs. Trask et al.*, 7 id., 566, cited and followed.

This action was brought by Ferdinand Sauer against Charles Steinbauer, to foreclose a mortgage on which one of three payments had become due, and the others to become due; on which judgment was entered for the whole amount, and for an absolute sale of the mortgaged premises. From which the defendant appealed to this court.

Hooker & Spangenburg, for the appellant.

J. Downer, for the respondent.

By the Court, PAINE, J. The single question presented on this appeal is, whether, in a judgment of foreclosure and sale, where some of the instalments are yet to become due, it is necessary to insert the provisions of the statute, that if the money is paid before sale, the proceedings should be stayed. The point has been decided in the affirmative by this court, in *Howe vs. English*, 6 Wis., 262, and that decision was again followed in *Wood et al. vs. Trask et al.*, 7 id., 566. And whatever might be the opinion of the court as now constitu-

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ted, were the question now first presented, yet we do not feel inclined to disturb an express decision of the court upon a matter which is only one of form. Having been decided, it is as easy for attorneys to conform to that decision in drawing their judgments, as to follow any other established form. And if, whenever a change occurs upon the bench, prior decisions upon questions of practice should be changed to suit the opinions of new judges, the practice never would be settled.

The judgment is reversed with costs and the cause remanded, with directions to enter a judgment in accordance with this opinion.

BABB *vs.* MACKEY.

APPEAL FROM CIRCUIT COURT, SAUK COUNTY.

Heard September 21, 1859.] [Decided January 4, 1860.

Former Suit—Pleadings—Mills and Mill Dams—Constitutional Law.

What effect will be given to a decree dismissing a bill in equity on the plaintiff's motion, or on the application of the defendant for want of prosecution, when such decree is set up in bar to a subsequent suit at law for the same cause of action between the same parties. Quere.

To a plea in bar, that a bill had been filed in equity for the same cause of action, that a feigned issue had been tried and verdict found for the defendant, and that after verdict the plaintiff's bill had been dismissed, the plaintiff replied that the bill was dismissed on his motion, upon his paying the costs to be taxed; but did not aver that the costs were taxed or paid; this was a material defect, and the replication was demurrable for want of such averment.

Where an action is several in its nature, so that there may be a different defense to each of the parts. The plea which answers but one of the parts, is not bad because it does not answer the whole of the declaration or count containing the separate parts of the cause of action. One of the parts may be answered in one plea, and others in another.

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The spirit of the code, § 10, sub. 4, as well as conducivenes to justice, require parties to apprise each other of the precise grounds upon which they rely.

The act of February 26, 1858, authorizing the construction of a dam across the Baraboo River, at Reedsburg, is sustained as constitutional, in accordance with the decisions upon the mill dam law.

The case of *Newcomb vs. Smith*, 1 Chand. 71, considered and followed.

This action was brought by James W. Babb against Joseph Mackey, for damages sustained by the plaintiff, by reason of building and maintaining a dam across the Baraboo River by the defendant, whereby the lands of the plaintiff were overflowed, and greatly injured, and a mill site on the plaintiff's land was destroyed. To this declaration the defendant pleaded three pleas: 1. General issue. 2. The proceedings in the case of *James W. Babb vs. David C. Reed*, in equity, concerning the same matter, and the dismissal of the bill after the verdict on the feigned issue found against the plaintiff; the dismissal of the bill, and that defendant is the grantee of Reed. 3. The act of February 26, 1856, entitled an act to authorize Joseph Mackey, &c., to build and maintain a dam across the Baraboo River at this point.

The plaintiff replied to the second plea of the defendant, that the bill in chancery was filed to compel Reed to lower his dam, and that the bill was dismissed by the complainant on leave granted, and on payment of costs. The plaintiff demurred to the third plea of the defendant. The defendant demurred to the replication of the plaintiff to the second plea. The court below sustained the demurrer of the plaintiff to the third plea, and overruled the demurrer to the replication, from which the defendant appealed.

J. Mackey, in person, for the appeal, in support of the demurrer to the replication, cited *Ogsburg vs La Farge*, 2 Com., 113; 11 Petersdorf Ab., 708; 1 Barb. Ch. R., 455 to 400; 1 Philips Ev., 389, and note 729; *Feller vs. Mullener*, 2 John., 181; 8 Paige, 81; 1 Chitty's Pl., 521 to 4; *Root vs. Woodruff*, 6 Hill, 416; 16 N. Y., 308.

On the constitutionality of the act recited in his plea he relied on the same authorities as are cited in *Fisher vs. Horicon Iron & Man. Co., supra*, 351.

Alvah Stewart & S. U. Pinney, for the respondent, in support of the replication to the second plea, cited the following: *State ex rel. Kane vs. Larabee*, 3 Chand., 179; *Cummins vs.*

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Bennett, 8 Paige, 78; *Simpson vs. Brewster*, 9 Paige, 245; Story Eq. Plead, § 1, 793; *Jenkins vs. Bell*, 2 Rich., 144; *Rosse vs. Rust*, 4 J. C., 299.

The second plea is not good, as it does not answer the whole declaration. It only sets up matters in answer to so much as relates to the mill site claimed by the plaintiff, and does not set up any defense to the injury done to the plaintiff's land by overflowing it with water, as alleged in the declaration. *Willmarth vs. Babcock*, 2 Hill, 194; *Boyd vs. Weeks*, 5 id., 395; *Root vs. Woodruff*, 6 id., 418; *Merceiw vs. Smith*, 2 id., 210; *Matthewson vs. Weller*, 3 Denio, 52; *Haliday vs. Noble*, 1 Barb., 138.

They also discussed the question of the constitutionality of the mill dam act, denying its validity, and citing a large number of authorities.

By the Court, Cole J. The authorities are not very clear as to what effect should be given to a decree dismissing a bill in chancery, on the plaintiff's motion, after verdict on a feigned issue in favor of the defendant. The general proposition is laid down in the books that the plaintiff may move to dismiss his own bill with costs, as a matter of course, at any time before the decree. 2 Danl., Ch. Pr., 929; *Perine vs. Swain*, 2 J. C. R., 475; *Cummins vs. Bennett*, 8 Paige 79. But what effect will be given to a decree dismissing a bill on plaintiff's motion, or on application of defendant for want of prosecution, when such decree is set up in bar to a subsequent suit for the same cause of action between the same parties, is not so well settled.

In the case of *Rosse et al. vs. Rust et al.*, 4 J. C. R., 299; where a cause had been set down for hearing on bill and answer, and the bill had been dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, the decree was held to be no bar to another suit for the same matter. Chancellor Kent declared that because the merits of the former cause was never discussed, and no opinion of

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the court ever expressed upon them, it did not come within the rule rendering the decree a bar to a new suit. See also *Broadlyn vs. Ord*, 1 Atk., 571; Mitford's Pleadings, 237, and cases cited in the notes; *State ex rel. Kane vs. Larabee*, 3 Chand., 179; *Bryne vs. Frere*, 2 Molloy, 157; same case in 12 Eng., Ch. R. 391.

In *Carrington vs. Hally*, 1 Dickens, 280, Lord Hardwick intimated, very clearly, that where an issue had been tried, and a verdict in favor of the defendant, that the plaintiff could not dismiss the bill on his own motion, upon payment of costs, since the defendant might set the cause down on the equity reserved, in order to have the bill dismissed upon the judgment of the court, so as to make the order of dismission pleadable. And the court of appeals in New York went further, and decided in *Ogsburg vs. La Farge*, 2 Comst., 113, that a decree of a court of chancery, dismissing the bill where no one appeared for the plaintiff, and the cause had been set down for hearing after replication, and an order closing the proofs, was a bar to a subsequent suit for the same cause between the same parties, although no proofs were in fact taken. Judge Bronson was disposed to follow the case of *Rosse vs. Rust*, and held that because no proof had been taken, and the bill dismissed in consequence of the default of the plaintiff to appear at the hearing, that it was not a bar.

Without stopping to examine these authorities for the purpose of determining whether the decree set forth, in the first special plea and replication thereto in this case, is in its nature final or not, we are clearly of the opinion that the replication to this plea is defective, for the following reasons: For the purpose of avoiding the effect of the matters set up in the first special plea, the respondent replied, that on motion of his solicitor to dismiss the bill, it was ordered that leave to dismiss the same be granted accordingly, and that

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the bill be dismissed, upon the complainant's paying to the defendant his costs in the suit to be taxed; but there is no averment in the replication that such costs were ever taxed and paid by the plaintiff. The order was a conditional one, and the suit was not absolutely out of court until the costs were paid to the defendant. *Cummins vs. Bennett*, 8 Paige, 79; *Simpson vs. Brewster*, 9 id., 245. The plaintiff wished to show by the replication that the merits of the chancery cause were never discussed and passed upon by the court, but that the bill had been dismissed, upon his motion, before final decree, and therefore, that the former suit mentioned in the plea was no bar. He set forth an order in which leave was granted him to dismiss his bill upon certain conditions, but he did not allege that he had complied with the condition which rendered the order efficacious. This was a material defect in the replication, and the demurrer to it, therefore, should have been sustained.

But it is insisted that the second plea was not good, as it did not answer the whole declaration, and as the demurrer to the replication reached back to this defective plea, it should have been sustained upon that ground. It is, undoubtedly the rule, that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading, demurred to, give judgment against the party, whose pleading was first defective in substance. We are, therefore, to consider whether the objection to the second plea is well taken.

The action was for damages done the respondent's land, by overflowing it with water, and also for destroying a mill site. It is manifest that the injury complained of is severable in its nature, as the appellant may have overflowed the land and seriously damaged it, without infringing any mill site. The second special plea professes to answer so much of the action as claims damages for destroying the mill

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site; while the matters of defense set up in the third special plea, as well as the general issue pleaded, covers the entire cause of action. By the New York rule, this would undoubtedly be bad pleading. *Root vs. Woodruff*, 6 Hill, 418, and cases there cited. Judge Bronson, in delivering the opinion of the court in *Root vs. Woodruff*, says: "But as I understand the rule in England, the plea need not go to the whole count, if their be other pleas which cover the residue; thus, in trespass for breaking the plaintiff's close, and seizing and carrying away his goods, the defendant, after pleading not guilty as to the whole, may, by another, plea justify the entry into the close, without saying any thing about the goods; or he may justify as to the taking of the goods, without mentioning the entry into the close. And without pleading any one plea going to the whole count, the defendant may, by one plea, justify the breaking of the whole close, and by another the seizing of the goods. It is enough that each plea is good as far as it goes, and that all of the pleas taken together cover the whole count." As a consequence of the rule denying the right of pleading partial defenses, the New York courts let the matter in by way of evidence, without such plea. *Willmarth vs. Babcock*, 2 Hill, 194.

In 1 Chitty Pleas, 524, the rule is stated that, "If a plea begins only as an answer to part, and is in truth but an answer to part; as if the defendant in trespass for taking two sheep, plead that the plaintiff ought not to have his action as to one, because he took that one doing damage on his close, &c., and does not in that, or any other plea, notice the remainder of the declaration, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends, but must take judgment for the part unanswered, as by *nil dicet*." *The Earl of Manchester vs. Vale*, 1 Saund, 27, and cases cited in the notes.

It would seem to be more conducive to justice to require

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the parties to apprise each other of the precise grounds upon which they intend to rely, and such seems to be the spirit of the code, § 10, sub. 4; *McKyning vs. Bull*, 16, N. Y. R., 297. Since the second special plea, while it professes to answer, only a part of the declaration is accompanied with other pleas, which cover the entire cause of action, we have concluded to treat it good for all it assumes to answer.

In the third special plea the appellant set up the proceedings taken by him under chap. 58, Private Laws, 1856, 61, as a full defense to this action. The main objection to this plea is that the act of the legislature is unconstitutional, and therefore, that the proceedings taken under it furnish no justification. In the case of *Fisher vs. The Horicon Iron and Manufacturing Comp., supra*, 351, the constitutional power of the legislature to pass a general mill dam law, was fully discussed, and we were earnestly pressed by counsel, who denied that power, and the validity of our present law, to reconsider the decision of the former supreme court in the case of *Newcomb vs. Smith*, 1 Chand., 71. For reasons given in the opinion in that case, we have declined to depart from the doctrine laid down in *Newcomb vs. Smith*, and consequently the power of the legislature to pass such laws, is not now an open question. The law referred to in the pleadings in this case, authorize the appellant and his assigns to erect and maintain a dam where the one complained of exists, and contains restrictions upon the privileges granted, and securities against the abuse of those privileges not found in the general law upon the subject. Assuming that the general mill dam law is constitutional, it would seem to follow that this is so. By this act, and by chap. 167 Private Laws, 1857, 387, amendatory thereof, the right of the respondent to maintain this action is taken away, and he must pursue his remedy for any damages he has sustained in conformity to those enactments. We do not think either of these laws impairs any

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vested right, but merely prescribed the manner in which the respondent shall enforce his remedy. *Reed vs. Frankfort et al*, 23 Me., R., 321; *Conkey vs. Hart*, 4 Kern., 23; *Thien vs. Vœgtlander*, 3 Wis., 461.

It follows from these views that the order of the circuit court sustaining the demurrer of the respondent, and overruling the demurrer of the appellant, must be reversed, and the case remanded for further proceedings.

PRATT et al. *vs.* DONOVAN.

APPEAL FROM CIRCUIT COURT, SAUK COUNTY.

Heard August 4, 1859.] [Decided January 4, 1860.

Constitution Law—Replevin—Judgment—Sureties.

Section 328 of the Code, which provides that when a judgment is rendered against a party in an action of replevin, the judgment may be entered up, as well against the principal as against the surety who shall have signed the undertaking for a return of the property, is not in violation of the constitution, on the ground that it deprives the sureties of notice of the judgment and of the right of trial by jury. COLE, J., dissenting.

A party who signs the undertaking provided for in section 328 of the Code, as surety for the return of property replevied, thereby becomes *quasi*, a party to the suit then pending, and is liable to have judgment entered against him with his principal, upon a failure of the principal to sustain his cause. COLE, J., dissenting.

A judgment for the defendant entered in replevin under the code, is not erroneous, because it is not in the alternative for a return of the property or the value thereof, in case a return could not be had according to section 187; but the defendant may waive the return and take judgment for the value only. COLE, J., dissenting.

This was an action for the delivery of personal property unlawfully detained, brought by the plaintiff, Charles C. Pratt, against the defendant, John E. Donovan, James A. Maxwell and Ozias V. Throop, two of the appellants, signed the undertaking of the plaintiff, Charles C. Pratt, to the coroner of Sauk

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county, in order to obtain a delivery of the goods in question. The complaint of the plaintiff is in the usual form for the unjust taking and detaining of the property. The answer alleges substantially, that the goods, &c., were the goods of Charles Sanford and Joseph W. Macklin, and not of the plaintiff; that on the 25th day of May, A. D. 1857, in Sauk county circuit court, one Lewis S. Mack recovered a judgment, in due form of law, against said Sanford and Macklin, for the sum of $1,093, damages and costs; that an execution was duly issued thereon, directed to the defendant as the sheriff of the county of Sauk; that said defendant, who is sheriff, by virtue of the execution and his office, did take and levy upon and detain the goods, chattels, &c., complained of in the plaintiff's complaint, as he rightfully might do.

A trial of this issue was had at the February term of the circuit court for Sauk county, 1858, and resulted in a verdict for the defendant, viz:

"We, the jury, do find for the defendant, and that he did not wrongfully take possession of the personal property mentioned and described in the plaintiff's complaint in the action, and did not wrongfully detain the same, as the plaintiff has, in his complaint alleged. And we do further find the property in the defendant, and that the defendant is entitled to the possession of said property; that the same is of the value of $3,432 71. And the defendant having waived the return of said property, we assess his damages at the sum of $1,202 23."

On this verdict the following judgment was entered by said court:

"This action having been brought on for trial and tried on the issue of fact joined therein, and the jury having returned a verdict by which they find that the said defendant did not wrongfully take and does not wrongfully detain the personal property mentioned and described in the complaint in this cause, and the said jury having, by their said verdict, found the property therein in the defendant, and that said defendant is entitled to the possession thereof, and that the value of the same is $3,472 71; and the said jury having, by their said verdict, assessed the damages of the said defendant at the sum of $1,202 23; and the said defendant having waived a judgment for the return of said property, and it appearing to the court, from the undertaking of James A. Maxwell and Ozias V. Throop, now on file with the clerk of this court, that they, the said James A. Maxwell and Ozias V. Throop, are sureties

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for the said plaintiff in this action. Now therefore, on motion of C. C. Remington, attorney for the said defendant, it is aljudged by the said court that the property in the goods and chattles mentioned in the complaint of the plaintiff, is in the defendant, and that the defendant is entitled to the possssion thereof, and that the same are of the value of $3,432 71, and that the damages of the defendant are of the sum of $1,202 23, and the defendant having waived a judgment for the return of said property, it is further adjudged, that the defendant, John E. Donovan, do have and recover the said sum of $1,202 23, as well of the defendant, Charles C. Pratt, as of the sureties, James A. Maxwell and Ozias V. Throop, and the sum of $29 43, costs and disbursements, amounting in the whole to the sum of $1,231 66.

The plaintiff, Charles C. Pratt, and James A. Maxwell and Ozias V. Throop, appealed from this judgment to the supreme court.

Gregory & Pinney, for the appellants, objected that the judgment entered under sec. 328 of the Code, against all the appellants, was erroneous; the section was unconstitutional and void, because it deprives the sureties in the undertaking of a constitutional right, that of a trial by jury, and the judgment rendered under this section of the code is not by due process of law. *Hughs vs. Hughs*, 4 Mon., 43; Smith's Const. Law, 556, 558; Const. of Wis., Art. I, § 5; *Dawson vs. Shaver*, 1 Blackf., 204; *Smith vs. Smith*, 1 How. Miss., 102; *Irvine's Appeal*, 16 Penn. St., 256; *Brown vs. Hummell*, 6 Barr, 86.

The sureties are deprived of their day in court, of the right to make up an issue, of the right of being heard and of producing testimony, and judgment is rendered against them without any notice; this we submit, is not "due process of law." Sedgwick on Const. Law, 610, 611 and 612; *Green vs. Briggs*, 1 Curtis, 311; *Green vs. James*, 2 Curtis, 189; *Taylor vs. Porter*, 4 Hill, 146.

J. C. Hopkins, for the respondent.

By the Court, PAINE, J. This action was commenced under the code, by Pratt, to recover the possession of personal property. The other two appellants signed the undertaking as sureties, according to section 117, and judgment having

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gone for the defendant, was entered against them, together with Pratt, in pursuance of section 328. The principal question presented on the appeal is, whether this latter section is unconstitutional and void, for the reason that it deprives the sureties of notice, and of the right of trial by jury. If, when fairly construed, it can be held to have this effect, it is of course invalid; as the right of every one to notice of proceedings against him, and to trial by jury in an action at law, by which he may be deprived of his property, is too well understood to need any suggestion from us.

In support of the objection, the following cases are cited: *Hughs vs. Hughs*, 4th Monr., 43; *Dawson vs. Shaver*, 1 Black., 204; *Smith vs. Smith*, 1 How., (Miss.,) 102; *Ervine's Appeal*, 16 Penn. St. Rep., 256; and *Brown vs. Hummell*, 6 Barr, 86.

In the first of these cases the judgment was entered against the sureties on an injunction bond, under an act which had been decided unconstitutional twenty years before, which had been acquiesced in without question. The case was decided upon that ground, and the court intimate that were it *res nova*, their decision might have been different. In *Dawson vs. Shaver*, the proceeding was by motion upon notice against the sheriff and his sureties, for money collected and not paid over. The court held the statute constitutional, but that the parties would be entitled to make up an issue, and have a jury trial, as the act did not prohibit it. In *Ervine's Appeal* it was held that the legislature had no authority to enact a law authorizing the orphan's court to appoint a trustee to sell certain real estate, belonging to parties of full age and *sui juris*, against their consent, which is simply an affirmance of the general principle that no man shall be deprived of his property without due process of law, and was clearly right. And the case in Barr is no more than an assertion of the same general principle.

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But if this judgment is to be sustained at all, it must be upon some ground which does not conflict at all with this general principle. And the only ground upon which it can possibly be placed is, that while the right is conceded, it is competent for the party himself to waive it, and voluntarily consent that judgment may be entered against him, without a jury trial, or any trial. This right of waiver, if properly manifested, will not be questioned. Judgments are entered upon cognovit, by stipulation, or by oral consent of the party, or of counsel acting for him; and their validity is not questioned. And we think the only question really involved here is, whether the signing of the undertaking by the sureties can be fairly construed into a conditional consent to the entry of judgment against them, in case judgment should go for the defendant. And I think it can. But in coming to this conclusion, I make a clear distinction between this case and that of *Smith vs. Smith*, 1 How., (Miss.,) 102, which I think to be sound law. In that case, judgment was entered under a statute allowing any one who had paid money for another as security, to have a judgment entered in his favor, on motion, without trial by jury. The court held the act void, and held it so justly. The right of entering judgment under that statute was not based upon any act of the defendant which, by any legitimate reasoning, could be construed into a waiver of his right of trial, or a consent to the entry of judgment against him. The most that he had done, if any thing, was to incur a debt, by reason of the plaintiff's having paid money for him as surety. And whether he had done this or not, was the very question upon which he had a right to trial, and the law could not assume that he had done it, even if the actual fact could be construed into a waiver of his right to trial, or a consent to judgment. But I go further, and hold that it is not competent to enact a law that judgment may be rendered without trial, upon every ordinary liability or debt between

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man and man, the contracting of which did not connect the party with any judicial proceeding, and then to say that any party who incurred such debt or liability should be held to waive his right to trial by jury. True, it might be said that he contracted the debt, knowing that the law authorized a judgment without trial, and so waived his right to trial. But the answer is, that he knew, also, that the constitution existed, invalidating any law depriving him of the right; and he was not bound to stop doing business, for fear that if he incurred a debt under such a law, he should be held to have waived his right; but might incur the debt, and then, with much more reason, be held to have intended to insist on his objection to the law, than to have waived the right secured to him by the constitution. Overlooking, therefore, the objection that such a law would assume that the party did incur the debt, which was the very thing to be tried, yet even if he did, there is nothing in that which, by any fair reasoning, can be forced into a consent to the entry of judgment against him without trial; and if this were not so, it would be very easy for the legislature to deprive everybody of the right of trial by jury, as to future transactions, by enacting that every creditor should be entitled to judgment, on motion, without trial, and then say that every one who contracted a debt, or incurred a liability, under such a law, should be held to have waived his right. It may be that the *Bank of Columbia vs. Oakley*, 4 Wheat., 235, would go to this extent; for I confess that I do not readily perceive any distinction between the law there in question, which authorizes a summary judgment on notes expressly made negotiable at the bank, upon the ground that a party making such a note had waived his right, and a general law, authorizing a summary judgment on a debt incurred in any other manner. But if the case should be held to go so far, I, for one, could not consent to follow it.

But I think this case is entirely different, and that the in-

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curring of an ordinary debt, which does not connect the party in any way with any suit or legal proceeding, is clearly distinguishable from the signing of a bond or undertaking, in a suit already commenced. By the latter, under a statute like the one under consideration, the surety becomes a *quasi* party to the suit. And he may well be said to have consented conditionally to the entry of the judgment against him. By their undertaking they are bound for "the prosecution of the action," and by entering into it, and thus connecting themselves with the suit, they consent to all the consequences to which such a connection by law subjects them. By their very undertaking, their right depends on the result of the suit as to their principal, and the trial which determines his right, determines theirs. They have substantially their day in court, and consent that their fate shall abide that of their principal.

And I think it is no objection to this view to say that the undertaking might be forged. The decision is placed upon the fact that the undertaking, assuming it genuine, fairly amounts to a consent to the entry of judgment. And we think the validity of the law is to be tested on this assumption. And if correct in the position that the undertaking is a consent, the fact that it might be forged does not invalidate the law. A *cognovit* might be forged; an attorney might, without authority, consent to a judgment, or one person might, by collusion, be sued for another and consent to judgment; in all such cases the party wronged would undoubtedly be entitled to his remedy on a proper application to the court. But we think the possibility of such a forgery or false personation, does not invalidate the law authorizing judgments by consent. The law proceeds on the assumption that the consent is genuine, and on that assumption its validity is to be determined.

Though this undertaking is not strictly a recognizance, yet we think it much in the nature of one. And the case of *Gildersleeve vs. The People*, 10 Barb., 35, where the question

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was upon a recognizance, supports the view we have taken. So also does that of *Lewis vs. Garrett's Administrators*, 5 How. (Miss.) Rep. 434; and even goes farther than we go here. For there judgment was entered on motion against the sureties on a sheriff's bond. And the counsel who contended against the validity of the law, rested his argument upon the distinction we have adopted, between bonds given in a suit commenced, by which the party connected himself with that suit, and those of a different character, conceding that on the former class, the summary judgment might be entered, p. 451. Upon the whole, we are therefore of opinion that sec. 328 of the code is not unconstitutional for the reason urged.

But another objection is made, which is, that the judgment is erroneous, not being in the alternative for a return of the property or the value thereof, in case a return could not be had according to sec. 187 of the code. And in support of this position the case of *Dwight vs. Enos*, 5 Seld., 470, is relied on, which, it must be conceded, fully sustains it. But after a most careful examination of the matter, we are constrained to place a different construction upon this section from that given by the New York court of appeals in this case, so far as it relates to the judgment which may be taken by the defendant. The court there, after alluding to the former provision of their Revised Statutes, which was the same as sec. 1, chap. 42, Gen. Laws, 1854, of this state, say that this left the defendant in such cases, "entirely at the option" to take a judgment either for the return or the value, as he might see fit. They then proceed, "The significant words then, 'in case a return cannot be had' incorporated into sec. 277 of the code, are new. Are these words to be rejected as surplusage? The words are clear and explicit, and have a plain and direct application to the subject matter of the section. Some meaning I think should be given to them." And accordingly, on the force of these words alone, the court held that this section of the code

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abolished the previous distinction which had existed between a plaintiff and defendant in this respect, and deprived the latter of the option as to the form of judgment which he previously had. But in coming to this conclusion, they seem to us to have entirely disregarded other words, in the section, which are quite as "significant" as those upon which their decision is based. The provision is as follows: "If the property have been delivered to the plaintiff, *and a defendant claim a return thereof*, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had," &c. Now it seems evident from this language that the entire provision as to the alternative judgment, is dependent on the fact that the defendant "claims a return." The clause clearly implies that it is optional with the defendant to "claim a return" or not, as he pleases, where the property has been delivered to the plaintiff, and it simply provides for the alternative judgment, where he *does* claim it, without determining what it should be when he does not. With this view, full effect is given to the words, "in case a return cannot be had," because they were clearly necessary to protect the right of the defendant, where he elected to have a return, if, for any reason, it could not be had. And this effect is given them, entirely consistent with the proper effect of the other words implying the right of the defendant to claim a return or not, at his option. But the court of appeals holds that the judgment must be for the return in all cases, and for the value, only where the return cannot be had. And with this construction, what effect is given to the words, "and a defendant claim a return thereof?" None at all, it seems to us. Those words clearly import an option for him to claim it or not; this construction destroys such option, and compels him to take a return in every instance where it can be had, whether he desires it or not.

If we look at the former provisions of the law, we think it

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supports our construction instead of the other. For, as the court of appeals concedes, before the adoption of this section a distinction existed between the plaintiff and defendant, and while the former was confined to his alternative judgment, the latter had an unqualified right of electing an alternative judgment, or an absolute one for the value. When, therefore, this section of the code retains language which clearly implies this same distinction, and recognizes the same right of election, if there could be any doubt of their intent, the fact that the right existed before would support that construction which preserves the right, rather than that which destroys it. Our construction gives due effect to all the language of the provision; the other seems to us to ignore a most significant portion of it.

The court of appeals also relies on the provision of section 289 of their code, sec. 199 of ours, in relation to the form of execution for the delivery of personal or real property. But this seems to us to furnish no support for their construction, because it only shows that where the execution *is* for the return, it is in the alternative. This must, of course, be so. And if the defendant "claims a return," his judgment must be in the alternative, and his execution also. But does this form of the execution, which could only issue on such a judgment, tend at all to show that the defendant was bound to have a judgment for a return whether he claimed it or not? If it does, we are unable to see it, but think, on the contrary, that it is entirely consistent with our construction, which gives the defendant the right to elect, showing only what his execution would be, where he elected a return. If he did not claim a return, his judgment would be a personal judgment, and his execution would follow that.

We think, therefore, that section 1, chapter 42, laws of 1854, was not inconsistent with this section of the code, and being saved by section 365, was in force when this judgment

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was entered; and that under it, the jury might properly assess the value of the interest of the defendant in the property, as they have done in the verdict. It is true they call it his damages, but as they expressly base that finding on a waiver of the return, it is clear that it was intended to cover the entire right or interest which the defendant had by virtue of his execution, and he took judgment for no more.

No other question being made, we think the judgment must be affirmed, with costs.

Cole J. dissented from the whole of the opinion in this case, but has not written a decision.

MILWAUKEE & MISSISSIPPI R. R. CO. *vs.* FINNEY.

ERROR TO CIRCUIT COURT, DANE COUNTY.

Heard August 4, 1859.] [Decided January 4, 1860.

Amendment—Damages—Principal and Agent.

Amendments to pleadings are matters addressed to the discretion of the court, and will not be reviewed, except in cases where it has been clearly abused.

To allow a party to prove the declaration of an agent of the opposite party, made after the transaction to which they relate, is erroneous.

In an action against a railroad company for the misconduct of the conductor in expelling the plaintiff from their cars, before he reaches the place to which he had purchased a ticket, the measure of damages is such sum as would compensate him for his actual loss by being put off the cars, and not vindictive damages or smart money; unless it appear that the conduct of the conductor was malicious, and his act was authorized or sanctioned by the company.

Where the misconduct of an agent causes a breach of the obligation or contract of the principal, then the principal is liable in an action, whether such misconduct be wilful or malicious, or merely negligent; and in such case, though the action be brought nominally in tort, it will be treated as *ex contractu*, and be governed by the same rules, unless the malice or wantonness of the agent be brought home and directly charged to the principal.

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This was an action commenced by James Finney against the Milwaukee & Mississippi Railroad Company. The complaint set forth that the plaintiff had purchased a passenger ticket at the Madison depot, from Madison to Edgerton, for which he paid ninety cents; that the plaintiff was received in the cars, and carried on the ticket to within eight miles of Edgerton, where the conducter of the train stopped the train and expelled him from the cars, refusing to carry him any farther, contrary to the conditions of his agreement with the company. The answer was a general denial of the facts stated in the complaint. On the trial of the issue, the plaintiff procured leave of the court and amended the complaint by making the averment of the expulsion of the plaintiff from the cars more certain and tortious. The plaintiff proved the facts set up in his complaint. He also proved what the ticket agent who sold the ticket said concerning the matter. This evidence was not contradicted by the defendants. The defendants then asked the court to instruct the jury, that in case they should find the issue herein for the plaintiff, that they should give the plaintiff such damages only as would compensate him for his loss by reason of putting him off the cars; that they could not give vindictive or punitory damages, called "smart money," which said instruction the circuit judge refused to give; but instructed them that:

"In this case, if you find the complaint sustained by the evidence, you may give such damages as shall compensate the plaintiff for his loss by the act of the defendant, and also such exemplary damages as you may find proper, under the circumstances of the case."

And the defendants requested the circuit judge to charge the jury that the plaintiff could not recover for any force or violence applied to the plaintiff by the servant of the company, unless the company authorized and directed its use, or afterwards ratified and approved such act of the servant, which instruction the circuit judge refused to give.

The jury found for the plaintiff and assessed his damages at $175, on which judgment was entered; and the railroad company sued out this writ of error.

Abbott, Gregory & Pinney, for the plaintiffs in error.

1. The circuit court erred in permitting the amendment, as it changed the cause of action from a breach of a contract to a tort. R. S., chap. 125, § 37.

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2. The circuit court erred in permitting the plaintiff below to give evidence of the declaration of the ticket agent. 1 Greenl. Ev., 113; 4 Phil. Ev., 381; 2 Starky Ev., 30; Story on Agency, § 135, 136; *Thallimer vs. Brinckerhoff*, 4 Wend., 394; *Bradford vs. Williams*, 2 Md. Ch. Dec., 1; *Hough vs. Doyle*, 4 Rawle, 294; *Hurd vs. West*, 2 Cowen, 752; *Hoover vs. Brown*, 7 Greenlf., 421; *Parker vs. Green*, 8 Mich., 142; *Fairlie vs. Hastings*, 10 Vessey Jun., 128; *Stiles vs. Western R. R.*, 8 Met., 44; Angell & Ames on Corporations, 309; *Stewart vs. Huntington Bank*, 11 S. & R., 174, 267; *Hayward vs. Pilgrim Society*, 21 Pick., 270; *Spaulding vs. Bank of Susquehanna County*, 9 Barr, 28; *Fairfield County Turnpike Co. vs. Thorp*, 13 Conn., 173.

3. The circuit court erred in refusing, and giving the instructions as to the measure of damages. The case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury. *Conrad vs. The Pacific Insurance Company*, 6 Peters, 262, 282; *Bell vs. Cunningham*, 3 id., 69; *Tracy vs. Swanton*, 10 id., 80, 95.

4. A corporation is not responsible for unauthorized or unlawful acts, even of its officers, though done *colore officii*. Angell on Corporations, § 388; *Thayer vs. Boston*, 19 Pick., 516; *Roe vs. Birkenhead, Lancashire & Cheshire Junction Railway Co.*, 6 Eng. Railway Cases, 601; *Eastern Counties Railway Co. vs. Brown*, id., 561; *Hazleton Canal Co. vs. Megeral*, 4 Barr, 324; *Vanderbilt vs. The Richmond Turnpike Co.*, 2 Comst., 479; *Phil. Germantown & Norristown R. R. Co. vs. Wills*, 4 Whaet., 143, (Pa.); *McManus vs. Cricket*, 1 Earl, 106.

Johnson, Harris & Rollins, for the defendant in error, in answer to the first point made, cited Howard's N. Y. Code, 296–9; *Chapman vs. Webb*, 6 How., Pr. R., 390, *Hagins vs. DeHart* 12 id., 322; 7 id., 294; *Harrington vs. Slade*, 22 Barb., 161; *Gray vs. Brown*, 15 How., 555.

2. On the first point of the admissibility of the declarations of the ticket agent, they cited Dunlap's Paley's Agency, 267; 5 Esp., 145; *Burk vs. Howard*, 13 Mis., 241; *Palethorp vs. Furnish*, 2 Esp., 211; *Greenwood vs. Curtis*, 6 Mass., 358; Halstead's Law of Evidence, 387; *Peyton vs. The Govs. of St. Thomas Hospital*, 3 C. & P., 363; *Price vs. Marsh*, 1 id., 60; *Bank of U. S. vs. Lyman* 20 Vt., 666; *State Bank vs. Wilson*,

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1 Dev., 484; *Barclay vs. Howell's lessee*, 6 Pet., 498; *McCormick vs Barnum*, 10 Wend., 104; *State vs. Farrish*, 23 Miss., 483, 493–4; P. Phil. Ev., C. & H.'s Notes, 181.

3. This is clearly a case where exemplary damages can and should be given. Sedgwick on Damages, 38, 454; 2 Parsons on Contracts, 446 to 453; Rutherforth's Institutes of National Law, Book 1, Ch. 17, Reparation, 209.

By the Court, Dixon, C. J. The order of the circuit court allowing the defendant in error, plaintiff below, to amend his complaint cannot be assigned for error in this court. Such amendment was a matter of discretion and will not be reviewed except in cases where it has been clearly abused.

The ruling allowing the plaintiff below to give in evidence the declarations of the defendants' ticket agent, made *after* the transaction of selling the ticket was closed, was clearly erroneous. This is abundantly established by the authorities cited by the counsel for the plaintiff in error. The rule as to the admissibility of the declarations of agents against their principals, is concisely stated by Judge Story as follows: "Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter, will also bind him, *if made at the time* and *constituting* a part of the *res gestæ*." The rule is the same whether the principal be a corporation, or a natural person. Angell & Ames on Corporations, § 309, and authorities there cited.

Under the proofs made we are also of opinion that the court improperly refused to instruct the jury as requested by the defendant's counsel, that the plaintiff was only entitled to recover such sum as would compensate him for his actual loss by being put off the cars, and that he was not entitled to vindictive damages or smart money. If it be admitted that the action of the conductor in expelling the plaintiff from the

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cars was wilful or malicious, or so grossly negligent, oppressive, or insulting, as to bring the case within the rule authorizing exemplary damages, if the suit had been brought against him; yet there was not one word of testimony offered showing, or tending to show, that *such* conduct on his part was either previously authorized, or subsequently ratified or adopted by the company. Although they may be liable in this action to indemnify the plaintiff for the actual loss or damage which he sustained by reason of the misconduct of the conductor, because it occasioned a breach of their duty or obligation to carry him from Madison to Edgerton; still it does not follow that they are to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages are given by way of punishing the malice or oppression, and are graduated by the *intent* of the party committing the wrong. But in an action against a principal for the act of an agent, how can the question of their assessment be properly submitted to the jury, when there is no evidence connecting the principal with such intent on the part of the agent? Clearly it can not. It appears somewhat strange that although the conductor himself was put upon the stand as a witness for the plaintiff, not a question was asked or a particle of proof offered to show the extent or scope of his agency, or whether under any circumstances he was empowered by the defendants to expel passengers from their cars. It may be that the omission was caused by the supposition that the rights and duties of passengers and conductor are universally well known and understood; but that supposition, if true, will not relieve parties from making proof in courts of justice where their rights in any way depend upon the extent of the authority of such agents. These remarks apply equally to the second instruction asked by the defendant below, and to that portion of the charge of the court wherein the jury were instructed that if

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they found for the plaintiff they might, in addition to such sum as would compensate him for his loss, give him such exemplary damages as under the circumstances they might find proper.

Another and more intricate and interesting question, not directly involved in the case, was raised and much discussed on the argument. It was, whether, under any circumstances, the principal can be held liable where the injury complained of is the consequence of the wilful or malicious act of the agent. As the question may become important in the future trial of this case, we deem it proper briefly to notice it. It was insisted by the counsel for the plaintiffs in error, that in no case could a right of action arise against the principal, for the wilful or malicious misconduct of the agent, unless it was previously authorized or subsequently ratified by him. On a careful examination of this position we are satisfied that it is incorrect. The case of *Weed vs. Panama Railroad Comp.*, 17 N. Y., 362, will be found to be a clear and well reasoned case upon the subject. It was there held that it was no defense to an action against a railroad corporation, for its failure to transport a passenger with proper dispatch, that the delay was the wilful act of the conductor in charge of the train. The rule established by that case, as we think with much reason is, that where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct be wilful or malicious, or merely negligent. The action though undeniably in tort is treated virtually as an action *ex contractu* and governed by the same rule as to damages, unless the malice or wantonness of the agent is brought home and directly charged to the principal. In this case the contract between the plaintiff and defendants was, that in consideration of his having paid to them the fee demanded, they were carefully to transport him in their cars from Madison to Edgerton. It is

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no defense for their breach of this contract that it was occasioned by the wilful act of their agent. The corporation was incapable of executing it except through the medium of its agents. If in so doing they violate it, no matter from what motive, their acts are the acts of their principals, who hold them out to the world as capable and faithful in the discharge of their duties. In no other way could the company be held to a performance of its contracts. The case differs materially from those cases where the agent or servant goes out of the line of his duty in the service of his principal or master, and commits a wilful injury. Such wrong involves no violation of duty or contract on the part of the master or principal.

The judgment of the circuit court must be reversed, and a new trial awarded.

DUNNING *vs.* FAULKNER.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard August 19, 1859.] [Decided January 4, 1860.

Costs—Jurisdiction—Justices of the Peace.

In those actions of which justices of the peace have jurisdiction, and which are sued in the circuit or county court it is the amount recovered in the latter courts which determines whether the plaintiff or defendant shall have costs, and how much.

Costs are allowable to the defendant in all actions for the recovery of money, brought in the county or circuit court, which are cognizible before a justice of the peace, unless the plaintiff shall recover judgment for $50 or more, and it makes no difference that the plaintiff's claim may exceed the jurisdiction of the justice.

The case of *Kreuger vs. Zirbel*, 2 Wis., 233, considered and approved.

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The facts in this case are fully stated by the court.

Orton & Bryant, for the respondent.

J. C. Hopkins, for the defendant.

By the Court, DIXON, C. J. A. G. Dunning sued James P. Faulkner in the circuit court of Dane county, claiming a recovery of $256,11, being treble the amount of eight distinct sums of excessive interest, which he alleged he had on as many different occasions paid to Faulkner for the loan of money. The action was instituted under section 3, chap. 172, Laws of 1851, and the complaint contained eight distinct counts or causes of action, no one of which amounted to $50. On the trial before a referee, Dunning recovered $17,13, for which judgment was rendered against Faulkner, together with the costs of the action, taxed at $41,68. Faulkner obtained an order for Dunning to show cause before the court why the judgment for costs should not be set aside for irregularity, and why such judgment should not be rendered in his favor. Upon the hearing of the order, his application was denied, and the judgment permitted to stand. From this decision he appeals.

The decision of this court in the case of *Kreuger vs. Zirbel*, 2 Wis., 233, is decisive of the question here raised. The statutes under which that case was decided, and those now in force are, as concerns the present controversy, in effect the same. Then, as now, in those actions of which justices of the peace had jurisdiction at all, it was the amount of the *recovery* had in the county or circuit court, which determined whether the plaintiff or defendant should have costs. This will at once appear from a comparison of the statutes. Sec. 10, chap., 120, R. S., 1858, prescribes in what actions justices of the peace shall not have jurisdiction. Subdivision 3 of sec. 38. chap. 133, provides that in such actions the plaintiff shall

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be allowed his costs as of course. This is, however, subject to the limitation contained in the next subdivision of the same section, which is that in actions of false imprisonment, slander, malicious prosecution, &c., where he recovers less than $50 damages, he shall recover no more costs than damages. The result of the trial shows that the controversy was cognizable by a justice of the peace, and the action not being one of those specified in the 1st and 2d subdivisions of the section, nor one of those particularly named in the fourth subdivision, it falls within the rule prescribed by the first clause of the last named subdivision, which in an action for money, requires a *recovery of fifty dollars or more*, to entitle the plaintiff to costs.

The next section of the same chapter provides that "costs shall be allowed, of course, to the defendant in the actions, mentioned in the last section, unless the plaintiff be entitled to costs therein." This disposes of the whole matter. The counsel for the respondent seem to have fallen into an error by supposing that because the action in the form in which it was instituted in the circuit court would not have been within the jurisdiction of a justice of the peace, if it had been commenced before him, on account of the amount of damages *claimed*, therefore the plaintiff is entitled to recover costs, regardless of the sum actually recovered. Such a rule would enable all plaintiffs to prosecute their claims, regardless of their nature or extent by actions in the circuit courts, and compel defendants to pay large bills of costs for such litigation, however trifling or small the real sum in controversy might be. Such, we believe, is not the object or effect of the statutes. *Kreuger vs. Zirbel*, goes directly to this point. There the action was for a breach of the covenants of a deed, and the damages *claimed* were $500. The sum recovered was $35, and because the county court gave judgment for the plaintiff for his costs, and overruled the motion of the de-

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fendant for judgment in his favor for costs, this court reversed the judgment as to the costs.

In most cases it is the amount of damages *claimed* which determines the jurisdiction of justices of the peace. But because in an action instituted before a justice, the plaintiff may, by exaggerating his claim to an amount exceeding that over which the justice has jurisdiction, deprive him of the right to entertain the case, it does not prove that by a like exaggeration in the circuit court, he can entitle himself to costs. It is the sum *recovered* in the circuit court which fixes the rights of the parties as to costs. If the plaintiff, in a case where his real demand for money is less than fifty dollars, institute his action in the circuit court, he does so at the risk of losing his own costs, and paying those of the defendant. The order of the circuit court must, therefore, be reversed.

The judgment for the plaintiff, as to costs, must be set aside for irregularity, and judgment entered for the defendant against the plaintiff for his costs in the action.

CHYNOWETH *vs.* TENNEY et al.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard August 19, 1859.] [Decided January 4, 1860.

Chattel Mortgage—Instruction.

A chattel mortgage containing these words: "All my stock of harnesses, whips, saddles, and other merchandise, now on hand, manufactured, *or such as shall be manufactured, or bought and contained in the shop or store occupied by me,*" &c., and containing a power of entry, and seizure on default, gives the mortgagee a revocable license to enter on the premises, and take the after acquired property;

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and if unrevoked, it justifies him to enter and take possession, according to the terms of the license, and the title is good as being taken with the assent of the grantor, but if before the license is executed, it is revoked; then it becomes inoperative and void. The instrument is not a transfer, but it may operate as a license to take the property.

On the trial of an action of replevin, the defendant claimed the right to take the goods, by virtue of a chattel mortgage, made by the plaintiff to the defendant, which specified all the stock, &c., on hand, and also "such as shall be manufactured, or bought and contained in the shop," the plaintiff asked the court to instruct the jury, that if they found the property in question was manufactured after the execution of the mortgage, and from materials purchased after its execution, in that case the mortgage, as to those articles, was inoperative, and would not justify the defendant in taking them, against the plaintiff's will; *held*, that this was a proper instruction.

The maxim "that a man cannot grant or charge that which he hath not," considered and enforced; and it makes no difference whether the controversy be between the parties to the grant, or otherwise.

A chattel mortgage of after acquired property is not effectual to create a lien in equity in the mortgagee, upon the property.

A chattel mortgage of after acquired property cannot be sustained as an executory contract, conferring an authority upon the grantee to enter, take and hold the property, against the will of the grantor.

This action was brought by Thomas Chynoweth against D. K. Tenney, Wm. M. Pyncheon, and Joseph Reese, to recover a quantity of harness, &c. The complaint was in the usual form under the code, in an action to recover property wrongfully taken, &c. The answer was a general denial; also a special answer, justifying under a chattel mortgage, made to R. H. Hartly & Co., to secure the payment of a promissory note, for $500, under which they claimed to act, as the agents of Hartly & Co. The other facts in the case can be readily gathered from the opinion of the court. Judgment was rendered for the defendants, from which the plaintiff appealed.

J. C. Hopkins, for the appellant.

Carpenter and Sprague, for the respondent.

By the Court, PAINE, J. The decision of this case depends upon the effect to be given to a chattel mortgage, given by the appellant, which describes the property in these words: "All my stock of harnesses, whips, saddles, and other mer-

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chandize, now on hand manufactured, *or such as shall be manufactured, or bought and contained in the shop or store occupied by me,*" &c. It contained also a power of entry and seizure on default, &c.

The defendants, as agents of the mortgagees, took possession, subsequently, of the property in the shop, which, however, the proof showed to have been bought by the mortgagor, and placed there after the execution of the mortgage. The appellant then replevied it. The material question in the case fairly arises on the first instruction asked by his counsel, which the court refused to give. It was this: if the jury "found the property in question was manufactured after the execution of the mortgage to Hartley & Co., and from materials also purchased after its execution, that in that case the said mortgage as to those articles was inoperative and void, and would not justify the defendants in taking said property from the plaintiff, against his will."

The effect to be given to conveyances which purport to grant property to be there after acquired by the grantor, has of late occupied the attention of courts to a considerable extent, and does not seem to be entirely settled. The maxim of the Common law, that "a man cannot grant or charge that which he hath not," if applied to it without qualification, would readily determine it. But the counsel for the respondents have assailed this maxim, and have contended with great force, that it ought not to be applied in this case. The position taken is, that while the authorities establish that as between the grantee and creditors of the grantor, or subsequent purchasers from him, the conveyance does not pass such after acquired property, yet that they do not establish it as between the parties to the conveyance, and that as between them it should be held operative. In support of this position, the various authorities on the subject are commented on, with much force and discrimination, in the printed argument of

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the respondents, and we have examined their position with that attention which the importance of the question demands. It appears, undoubtedly, that the question, in most of the cases, has arisen between the grantee and subsequent purchasers or creditors of the grantor. But this was not so in all. And even in those where such was the case, while the courts have sometimes alluded to the use that might be made of such conveyances, if sustained, to defraud creditors, yet in no one which has fallen under our observation, has the decision assumed that the question should be decided differently, in favor of creditors, from what it should be when occurring between the parties. On the contrary, the grounds upon which those decisions are based, seem to preclude this idea. They are not based upon the ground of fraud. If they were, that would be a sufficient ground in itself, and would have relieved the courts from the necessity of inquiring further into the legal effect of such conveyances to pass the property. They were based upon the ground, that according to the maxim alluded to, the conveyance was not operative to pass the property. The creditor or subsequent purchaser held it, not because fraud made it void as against him, but because as between the parties to the conveyance, it had, and could have, no effect to transfer the property. When those decisions, therefore, in favor of the creditor, are placed upon the very ground that it was impossible in law for the grantor to convey the property, and so he did not convey it, they would seem to leave no room to say, even when the question occurred between the parties, that it *was* possible to convey it, and it was conveyed. If this can be said as between the parties, then some other reason must be given for the decisions in the case of creditors. It must be said, not that the grantor could not convey, but that the conveyance was void as against them. For it seems clear that when the question turns upon the possibility of such a conveyance being effec-

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tual to transfer after acquired property, it cannot be said in one case to be possible, and in another impossible. For the possibility of it relates, in both cases, to its effect between the parties. And the maxim alluded to, upon which all the opinions rest, evidently relates entirely to the effect of the conveyance between the parties, without being founded upon any considerations growing out of the rights of third persons. We think, therefore, after carefully examining the authorities cited, that the question as to the effect of such a conveyance, so far as actually transferring after acquired property is concerned, must be decided in the same way, whether it arise between the parties to the instrument or otherwise.

The case of *Lunn vs. Thornton*, 50 E. C. L., 379, was a case where the question arose between the parties, and the grantor was allowed to sustain an action of trover against the grantee, for taking after acquired property, attempted to have been conveyed by a bill of sale. The plea presented the precise question whether a conveyance could transfer property to be thereafter acquired by the grantor; and the court laid down the rule, which seems fully sustained by all the authorities, some of which will be hereafter referred to upon another point, that such a conveyance was inoperative to transfer the property, without some new act on the part of the grantor ratifying it, after he had acquired it. See, also, *Head vs. Goodwin*, 37 Maine, 182.

But it is insisted that the plaintiff is estopped from denying the right of the mortgagees. That it is analagous to the case where one sells a specific article of personal property without title, and afterwards acquires title; or where one sells real estate and and warrants the title, having no title at the time, but afterwards acquires it. In each of these cases the grantor is estopped from setting up his after acquired title against his previous grant. And it is said this case comes within the same principle. At first sight, this seems plausible, and it re-

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quires an effort of the mind to distinguish the cases, but we think they are fairly distinguishable. An estoppel prohibits one from setting up the truth against some act or statement of his own, upon which another has acted in such manner that he will be injured if the truth is afterwards allowed to be shown. It may be supported, therefore, in the cases above supposed, upon two grounds. In the first place, the party who sells a specific article of personal property, then in existence and expressly designated, or a piece of real estate, asserts that he then has an existing title, and the vendee purchasing relying on this assertion. He has a right to rely on it. If it is untrue in fact, he is not bound to know it. And it would clearly be contrary to every principle of justice to allow the vendor to set up an after acquired title against his conveyance. But this reason does not exist in case of a conveyance of the kind in question. There it appears on the face of it that the grantor has no title. And the grantee is bound to know that, in law, the conveyance is inoperative. This ground of estoppel, therefore, fails. The other ground is derived from the implied warranty of title in the sale of personal property, and the express one in the sale of real estate. There, the party being bound to support and defend the title, cannot be permitted himself to overthrow it against his own duty and obligation. And in each instance, the property being then in existence and expressly designated, the agreement to warrant the title has a subject to which it relates, so that the agreement is operative, though the grantor has no title. Thus, if I undertake to sell a particular horse, even though I had no title, yet the implied warranty would relate to that horse, and would not fail for want of a subject to which it applied. But here the case is different. A covenant to warrant the title, so far as after acquired property is concerned, is inoperative for want of a subject. The property is not in existence. The covenant, when made, relates to no specific prop-

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erty, and never becomes operative because, on the face of the conveyance, it appears that the transfer is totally void for want of a subject matter. We think, therefore, that the doctrine of estoppel does not apply to such a case. And this view is fully sustained by the case of *Crawford vs. Lockwood*, 9 How. Pr. R., 547, in which the opinion is delivered by Justice Selden. And the fact that in *Lunn vs. Thornton*, and the other cases, where the effect of a conveyance of this kind has been fully discussed, no suggestion seems to have been made that the doctrine of estoppel was applicable, is also entitled to much weight upon this point.

But it is contended further that, although this instrument may be inoperative at law, yet that it was effectual to establish an equitable lien. And the decision of Judge Story in *Mitchel vs. Winslow, et al.*, 2 Story, 630, and the authorities by him cited, are relied on to support this position. But we think the doctrine of this case had been so fully denied by subsequent cases, that it cannot be considered as law. *Moody vs. Wright*, 13 Met., 31; *Mogg vs. Baker*, 3 Mees. and Wels., 195; *Gale vs. Barnwell*, 7, Ad. and El. N. R., 850. And in *Congreve vs. Evetts*, 10 Ex. R., 307, Parke, B. says that such a conveyance "gave no legal title, *nor even equitable title*, to any specific goods." Other cases, to the same effect, might be cited, but we deem it unnecessary.

And this brings us to the last and most doubtful question to be determined. That is, whether, conceding the instrument not valid as a transfer, it can be sustained as an executory contract, conferring an authority upon the grantee to enter and take such after acquired property, and hold it against the will of the grantor? We have not found any case where the facts made it necessary to decide this precise question. But there are cases which contain *dicta* and intimations that would certainly support the position. The case of *Moody vs. Wright*, 13 Met. 31, before cited, states the doc-

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trine as follows: "a stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement of such a character, that the creditor with whom it is made, may, under it, take the property into his possession, when it comes into existence and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his posession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but until such act done by him, he has no title to the same; and that such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good." This would seem to cover almost the exact ground, but we still think it does not necessarily, and if it did, there was nothing in the case that presented the question how far such an agreement conferred an authority on the grantee that could be enforced by him against the subsequent dissent of the grantor. No possession had ever been taken or attempted by the grantee, and the case was decided upon that ground. The question, therefore, of the extent of his right to take possession as against the grantor, was not really in the case. And when the language of the court is closely examined, we think it does not contemplate the question whether the grantor might revoke the authority before possession taken, but only asserts, assuming no such revocation, that the agreement would be a sufficient authority for the grantee to take possession. And this, we think, may well be admitted, without touching the question of the right of revocation in the grantor.

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The question arose, in the case of *Chapman vs. Weimer et al.*, 4 Ohio St. Rep., 481. In that case the mortgagor had, after acquiring the property, delivered it to the mortgagee, and the decision was placed on that ground. And the court, having quoted the above extract from *Moody vs. Wright*, say that the "Judge clearly expresses the opinion" that the agreement would authorize the mortgagee to take possession, "without having the property actually delivered to him by the mortgagor." But they carefully guard against committing themselves to that doctrine by saying that, in the case before them, "it is not necessary to carry it to that extent." And that extent was, as before stated, only that under the mortgage, the grantee might take possession without any further authority from the grantor, without touching the question whether the grantor might revoke or annul that authority.

The question, though not exactly involved, has been recently commented on in several cases in the English courts, and while the exact points adjudicated do not seem to sanction the right of the grantee under consideration, yet there are such strong intimations in its favor, as to leave it in a state of great uncertainty. In *Lunn vs. Thornton*, while the pleadings presented the precise question whether the instrument could operate as a transfer, which the court decided in the negative, they yet take pains to say that they decide that question only, and throw out the following intimation: "It is not a question whether a deed might not have been so framed as to have given the defendant *a power of seizing* the future personal goods of the plaintiff, as they should be acquired by him and brought on the premises, in satisfaction of the debt." This has been strongly relied on in subsequent cases, as indicating that the court thought such a power might be given; and it is so urged by the respondent's counsel. But it is, undoubtedly, a very unsafe rule, to place

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reliance on intimations of this character. Courts commonly have enough to do to decide what is absolutely necessary for them to decide, and where the case permits it, they frequently assume, for the sake of the argument, and to clear it of other questions, propositions which they by no means decide. This very case of *Lunn vs. Thornton*, taken in connection with the previous case of *Tapfield vs. Hillman*, 64 E. C. L., 243, furnishes a striking illustration of this fact. In the latter case the question was whether an assignment of property on certain premises justified the seizure of property afterward acquired and placed thereon. The court, in construing the instrument, held that it did not include such after acquired property. But they clearly assume that if it had, such property could have passed under it. But when the very question was presented in *Lunn vs. Thornton*, they had to decide that such property could not be transferred by such an instrument. It would be very unsafe, therefore, to hold that the intimation in *Lunn vs. Thornton*, as to the possibility of so framing a deed as to confer such a power of seizure, furnishes any real support for the doctrine, that it can be so framed as to give the grantee authority to enforce it against a revocation by the grantor. And a similar view of the danger of relying on such intimations is supported by the comments of the court in the case of *Hamilton & Robinson vs. Rogers*, 8 Maryland, 301, which is a decisive case against the validity of such instruments as transfers.

In *Congreve vs. Evetts*, 10 Exch. Rep., 298, the grantee took possession without any other license or consent on the part of the grantor, beyond that contained in the deed; and the court held that the possession so taken was under the authority of the grantor, and vested the title in the grantee. But the question did not arise between the grantor and grantee, and there was nothing in the case that raised the question what would have been the effect of a dissent by th

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grantor, or a revocation before possession taken. It is only an authority, therefore, to the extent that the instrument justifies taking possession in the absence of any question as to revocation by the grantor.

The case of *Hope vs. Hayley*, 85 E. C. L., Rep., 829, is also relied on. There are intimations in it supporting the right claimed, but we think its actual authority is the other way. In that case the grantee had taken possession with the consent of the grantor. Lord Campbell, after very properly holding that an ineffectual attempt in the instrument to transfer the property, ought not to prevent it from having any effect as a license, that it might otherwise have, proceeds to say: "The defendants having taken possession with Routledge's acquiescence, he must be considered to have consented to their having the property. It could not, indeed, be granted when not yet in the possession of the grantor, but the defendants take actual possession, *and he assents to that. There is a subsequent act, abundantly sufficient to satisfy Lord Bacon's rule.*" Thus placing his opinion on the subsequent act of the grantor, which is sufficient within all the authorities. Coleridge, J., goes somewhat further in his intimation, but falls back on the same rule, by saying that if he was wrong in his other view, "there was a sufficient intervening act."

In this state of the authorities, the precise question which we have to pass on, seems to be undetermined. And though the conclusion to which we have arrived has not been reached without considerable doubt, yet we think it reasonably results from the principles established by the cases referred to. That conclusion is, that an authority like the one in question, is a revocable license; that if unrevoked, it justifies the grantor in taking possession according to its terms, and that when he has so taken possession, he has done it with the consent of the grantor, and his title becomes good; but be-

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fore it is executed, the grantor may revoke it, by forbidding the grantee to take possession, and that then it becomes wholly inoperative and void. We have arrived at this conclusion by the following process: 1. The various cases establish beyond question, the proposition that such an instrument cannot operate as a transfer. They also establish that it may operate as a license. And by applying to these two propositions the law fixing the nature and character of a license, the conclusion follows, that it is revocable. The law last referred to is very clearly stated in *Wood vs. Leadbitter*, 13 Mees. & W., 843–4. It was a case where the proprietor of race grounds had sold tickets for a guinea each, which it was understood would admit the holder to the grounds during certain races. The plaintiff had purchased such a ticket, and entered upon the grounds, but before the races were over, was, after being requested to depart, put off the grounds without unnecessary violence, by the order of the proprietor, without refunding the guinea. The question involved was the right so to put him off. The court held that the right to remain upon the land during the races, was such a right as could only be granted by deed, and that therefore the plaintiff had a mere license. And then the law, in regard to the effect of such a license is so clearly stated, and seems to us so applicable to the precise question here, that we cannot forbear quoting at some length from the opinion, the first part being itself a quotation from the opinion of Lord. C. J. Vaughn, in *Thomas vs. Sorrel*: "In the course of his judgment the Chief Justice says; (Vaughn, 351); 'A dispensation or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer

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killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed, and the tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licenses; but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and in the wood burnt. So in some cases by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property.'

"Now, attending to this passage, in conjunction with the title, LICENSE, in Brooks' Abridgment, from which, and particularly from paragraph 15, it appears that a license *is in its nature revocable*, we have before us the whole principle of the law on this subject. A mere license is revocable; but that which is called a license is often something more than a license,—it often comprises or is connected with a grant, and then the party who has given it, cannot, in general, revoke it, so as to defeat his grant to which it was incident."

"It may further be observed that a license under seal, provided it be a mere license, is as revocable as a license by parol; and on the other hand, a license by parol, coupled with with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol But where there is a license by parol, coupled with a parol grant, or pretended grant of something which is incapapable of being granted otherwise than by deed, there the license is a mere license; it is not incident to a *valid* grant, and it is therefore revocable. Thus, a license by A. to hunt in his park, whether given by deed or parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license, be as put

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by Chief Justice Vaughn, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to com. on the land, and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my land and there make a water course to flow on the land of the licensee; in such a case there is no valid grant of the water course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water course; and if it did, then the license would be irrevocable."

This doctrine seems to us fully to support the conclusion above stated. The instrument in question was inoperative as a transfer; it did create a license, and the license being uncoupled with any interest whatever, and, in the language of the case just cited, not being "incident to a valid grant," was revocable. We have sought in vain for any principle or rule of law which can, consistently with other established principles, furnish any solid foundation upon which to rest the right of the grantee, in such a case, to enforce the mere license against the subsequent dissent of the grantor. We could not rest it upon the instrument, without giving it, in itself, some effect as a transfer, which is repugnant to the established position that it cannot have such effect. It being, therefore, only a license, expresssly called so by the Judge in *Hope vs. Hayley*, though its authority may continue, if unrevoked, and if possession is actually taken under it, it would be evidence of a continuing assent on the part of the grantor to such taking, and equivalent to a delivery by him, so that it would then give effect to the transfer; yet before that,

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being a mere license, it is revocable, and if revoked, is at an end.

It may be said that this seems inequitable, and is not carrying out the intention of the parties. But this may be said of many other cases, where, by the established rules of law, no effect could be given to such intentions, as where they attempt to make contracts, void within the statute of frauds. In the case last cited, it certainly seems inequitable, and contrary to the intention of the parties, that the plaintiff, after paying his guinea to see the races, could be put off by the one who had taken his money, without its being refunded. But such was the legal result of the manner in which their intentions were evidenced. The answer to all such objections, is that courts can only so far carry out the intentions of parties, as they are according to the established rules of law, evidenced in such manner as to make them binding and effectual.

We think, therefore, that the instruction asked by the appellant's counsel, which implies a dissent to the taking by the grantor, should have been given. The judgment is reversed, with costs, and the cause remanded for a new trial.

JAMISON *vs.* GJEMENSON.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard September 20, 1859.] [Decided January 4, 1860.

Mortgage—Priority.

Where an agent of the plaintiff had his mortgage in possession and at the same time made a negotiation to borrow money to extinguish a prior and paramount mortgage which he did by making another mortgage, which, with the satisfaction of

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the prior mortgage, are placed on record before the mortgage of the plaintiff: Held, that the possession and knowledge of the agent is not knowledge to the mortgagee, who advanced the money to extinguish the prior mortgage, of the existence of the mortgage in the hands of the agent, and the plaintiff does not thereby become a prior mortgagee.

A subsequent incumbrancer cannot object to a judgment entered by foreclosure against his vendor, that it was improperly entered, unless he also show that the premises will not on a sale be sufficient to pay the judgment as rendered and the subsequent incumbrance.

This was an action commenced by John M. Jamison, against Toleff Gjemenson, impleaded with Stark Larson and his wife, to foreclose a bond and mortgage made by Larson to secure the payment to Jamison of $1,500, with interest semi-annually, and conditioned that if the interest was not paid when due, the whole might become due at the option of the mortgagee. The interest due December 1, 1857, was not paid, and suit was commenced for the whole sum. The mortgage was dated July 1, 1857, acknowledged on the 30th, and recorded the 31st of July. The principal was to become due, except for the option, July 1st, 1862. Gjemenson was made a party as a subsequent incumbrancer; and in his answer he set up that he claimed by a prior mortgage, dated May 26, 1857, made by Larson for $400; and that he should be first paid. The issue was referred to a referree, who reported as facts: "That Jacob H. Preus was the agent of Stark Larson, for the purpose of negotiating the loan for which the mortgage, held by the plaintiff, was given, and for the purpose of attending to the necessary business connected therewith.

Hasbrouck & Gurnee were the agents of the plaintiff Jamison, for the purpose of effecting the loan of fifteen hundred dollars, for which the mortgage now sought to be foreclosed was taken, and to see that proper securities were taken therefor. Jacob H. Preus took the plaintiff's bond and mortgage before execution from Hasbrouck & Gurnee, and took them to the residence of Stark Larson, caused them to be executed, and returned them to Hasbrouck & Gurnee, July 31st, 1857, having at the same time the mortgage of the defendant Gjemenson, referred to in his answer, in his possession, unrecorded.

The consideration of the plaintiff's mortgage was the satisfaction of another and prior mortgage, given by the defendants, Stark Larson and wife, upon the same premises de-

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scribed in the plaintiff's mortgage to Kjorstel Gunderson, and by said Kjorstel Gunderson assigned to Wm. C. Hasbrouck, who was the owner thereof at the time the same was satisfied.

At the same time that the plaintiff's mortgage from Stark Larson was recorded in the office of the register of deeds for Dane county, the satisfaction of the mortgage owned by Wm. C. Hasbrouck, was recorded in the same office.

The defendant Gjemenson's mortgage covers the same premises as the plaintiff's mortgage. It bears date May 26, 1857, was acknowledged on the day of the date, and recorded July 31, 1857, at 4 o'clock P. M.

Hasbrouck & Gurnee were the agents of Wm. C. Hasbrouck. They had in their possession the satisfaction of the mortgage owned by Wm. C. Hasbrouck, and put it upon record.

They also had in their possession the $1,500 belonging to the plaintiff, and were to deliver it to Wm. C. Hasbrouck upon the execution and delivery of the mortgage of the plaintiff, and upon the recording of the satisfaction of the mortgage owned by Wm. C. Hasbrouck.

Wm. C. Hasbrouck resides in the state of New York. The $1,500 was not remitted to him at the time the defendant Gjemenson's mortgage was put upon record. It was remitted to him within two or three days from the time his mortgage was satisfied of record, and before the plaintiff or his agents, or either of them, had actual notice of the existence of the defendant Gjemenson's mortgage.

Preus was not the agent of the plaintiff Jamison for any purpose. Preus was informed of the existence of the defendant Gjemenson's mortgage before he delivered the mortgage of the plaintiff to his agents, Hasbrouck & Gurnee.

I find due from the defendant, Stark Larson, to the plaintiff, upon the bond and mortgage, the sum of $1,770.

As a conclusion of law, I find that the defendant Gjemenson's lien or incumbrance upon said mortgaged premises accrued subsequently to the lien of the mortgage of the plaintiff."

Upon this report judgment was entered against the defendant's for the sale of the mortgaged premises; from which Gjemenson appealed to this court.

J. C. Hopkins, for the appellant.

Hasbrouck & Gurnee, for the respondent.

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By the Court, PAINE, J. We think the judgment in this case must be affirmed. It is very clear from the evidence that Preus acted as the agent of Larson, and not of the plaintiff, or of Hasbrouck & Gurnee. His knowledge, therefore, was no notice to them.

We think it very clear, also, that the plaintiff's mortgage was entitled to priority. Hasbrouck & Gurnee were agents both of the plaintiff and of Wm. C. Hasbrouck. As agents of the plaintiff they had his money to loan; as agents of Wm. C. Hasbrouck they had the prior mortgage for collection. Instead, therefore, of handing the plaintiff's money over to Larson, on the loan for which this mortgage was given, and then taking it back from Larson in payment of the mortgage of Wm. C. Hasbrouck, they had him execute this mortgage and deliver it, and they put on record, at the same time, a satisfaction of the mortgage of Wm. C. Hasbrouck. They then held the money for Hasbrouck. And even though they received notice of Gjemanson's mortgage before it was remitted to him, this does not bring it within the rule of notice before payment of the purchase money. The purchase money was paid to Larson by the satisfaction of Hasbrouck's mortgage. That could not be recalled; and the transaction was substantially the same as though the money had been paid to Larson on the loan, and then paid back by him to the agents of Wm. C. Hasbrouck, to take up his mortgage. It was Hasbrouck's money, and the entire consideration as between the plaintiff and Larson had been paid.

As to the judgment drawing interest at twelve per cent., and the question whether the plaintiff gave notice of his election to have the whole sum become due; we think the appellant has not shown any right to raise any question as to them. We held at the present term, in the case of *Boyd vs. Sumner and the Bank of Milwaukee et al., supra*, 41,

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that a subsequent incumbrancer could not raise the question whether the stipulation in a prior incumbrance was for a penalty or valid interest, without offering some proof to show that the premises might not, on sale, be sufficient to pay the judgment as rendered, and the subsequent incumbrancer. If they would clearly be sufficient to pay both, the subsequent incumbrancer would not be aggrieved by the judgment. And the only effect of reversing it at his suggestion would be to benefit a party who had not appealed. We think the same rule applicable here. There is no proof to show that the premises are not sufficient to pay the judgment as it stands, and also the appellant's mortgage. If they are sufficient, he has no right to raise questions between other parties who are satisfied with the judgment, and the decision of which either way, cannot affect his interest. We think the burden is on the party appealing, to make it apparent that he may be aggrieved by the decision to which he objects.

The judgment is affirmed with costs.

BATES *vs.* WILBUR.

APPEAL FROM CIRCUIT COURT, JEFFERSON COUNTY.

Heard November 16, 1859.] [Decided January 4, 1860.

Chattel Mortgage—Replevin—Finding.

Where the mortgagee of chattels is in possession of the property, it is not necessary to renew his mortgage by affidavit, to enable him to maintain an action for the possession of the property.

Where a trial is had before the court, without a jury, the finding of the court must

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be as broad as the verdict of a jury should be in the same case, or no judgment can be sustained thereon.

A finding in an action of replevin, which does not fix the damages for the detention, is fatally defective, and will not support a judgment in the cause.

A finding in an action of replevin, which does not find and determine the right of possession, will not support a judgment for the possession.

This was an action of replevin in the *detinet*; commenced by Jonathan R. Bates, against Miles Wilbur, to recover the possession of a buggy. The defendant pleaded the general issue, and gave notice, as a justification, that Wait & Baldwin had recovered a judgment before a justice of the peace, on which execution had been issued against the goods, &c., of Joseph Clifton, and delivered to the defendant, as a constable for service; and that he had seized the property in the possession of Clifton, as his property; that he had sold it, by virtue of that execution; and of another also in his hands, in favor of Pliny Potter, also issued by the same justice. The cause was tried by the court, without a jury.

The plaintiff proved that Clifton made the buggy, and before it was completed, he mortgaged it to the plaintiff, and delivered it to him; but it was left at the shop, to be finished, where it was levied upon by the defendant. He also read the mortgage on which it was delivered, and which bore date more than a year before the date of the levy. The defendant objected to the reading of this mortgage, because it had not been renewed by affidavit; nor was there any evidence that the debt mentioned in it was a true one; but it was received.

The defendant proved that a Mr. Noyes was at work for Clifton, and Clifton secured him for his work on this same buggy, with Bates' consent. The defendant also read his execution and judgment, with the levy.

Upon this evidence the court found that Clifton made the wagon or buggy, and gave the plaintiff a chattel mortgage for the same, with other property, and delivered said buggy in dispute to the plaintiff.

That defendant, as constable, took the buggy in question, on execution and attachment against Clifton, and detained the same. And the court considers that by law, a mortgagee of a chattel, having taken possession of the same, may maintain replevin in the detinet against a constable who takes the same on the debt of a mortgagor, and detains the same. And the court make an allowance of five per cent. to the plaintiff,

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by way of indemnity for his expenses upon the value recovered, and find the value of the property to be one hundred and five dollars.

Upon this finding, judgment was rendered for the plaintiff, and the defendant appealed.

J. E. Holmes, for the appellant.

1. The respondent objected to receiving the chattel mortgage in evidence, for the reason that "it does not appear in evidence that the said mortgage has been renewed by affidavit, as required by statute." R. S., 1849, 255, §§ 5 and 7.

2. In replevin, the plaintiff is bound to show that he has a right to have delivery, or immediate possession of the property, when he issues his writ. *Sharp vs. Whittenhead*, 3d Hill, 576; *Wheeler vs. Train*, 3d Pick., 258. The question now is, did the respondent show that right. We contend he did not, on several grounds. It was necessary to show a demand in the detinet. *Ingalls vs. Buckley*, 13 Ill., 317; *Beebe vs. Bunn*, 3 Eng., 565. The property being in possession of the defendant in the execution, respondent had a right to levy upon or attach it. Whether the property was in possession of the mortgagee, or the mortgagor, who was defendant in the execution, the appellant had a right to levy upon the interest of the mortgagor, which is all that is attempted. R. S. 1849, chap 102, § 49. There was no wrongful conversion. There could be none, without demand. *Gardner vs. Campbell*, 15 John., 401; *Randall vs. Cook*, 17 Wend., 53.

3. The general exception taken to the finding and judgment of the court in this case, is equivalent to a motion for a new trial. The whole testimony is matter of record, and is before this, as it was before the court below, and under the motion for a non suit, is under review as upon a motion for a new trial.

D. F. Weymouth, for the respondent.

By the Court, Dixon, C. J. Many of the questions discussed in this case, by the appellant's attorney, were directly passed upon and settled by this court, in the case of *Cotton et al. vs. Marsh et al.*, 3 Wis., 221. The only exceptions not determined by that case, are those which go to the want of an

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affidavit renewing the mortgage, before the expiration of the year, and to the form and sufficiency of the finding. The objection to the chattel mortgage being received in evidence, without such affidavit, was properly overruled. The rights of the parties must be determined by the facts, as they stood at the time the cause of action accrued. The property having been taken from the mortgagee, and his rights remaining merely in action, it was not necessary for the purpose of enabling him to maintain the suit, that such affidavit should be made. His cause of action against the defendant, if he had any, had already accrued, and was vested in him, by virtue of what had transpired whilst the mortgage was in full force. His subsequent conduct, unless it amounted to a release, was no defense.

The finding, however, is fatally defective, and the judgment cannot be supported by it. A jury having been waived, the action was tried by the court. In such a case, the finding must be as broad as the verdict would have been. Sections 26 and 27, of chapter 119, R. S. 1849, under which this action was tried, prescribed that if, upon the trial of a cause, the verdict was in favor of the plaintiff, the jury should assess the damages which he had sustained for the unjust taking or detention of the property, as well as the value of the goods and chattels specified in the declaration. In this case, no damages whatever were assessed, but an allowance of five per cent., by way of indemnity, is given. The right of possession which the action was brought to try, is not determined at all. A right of possession in the defendant might well exist, notwithstanding all the facts stated.

The judgment must be reversed, and a new trial awarded.

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HASLER *vs.* SCHUMACHER.

APPEAL FROM CIRCUIT COURT, BROWN COUNTY.

Heard November 18, 1859.] [Decided January 4, 1860.

Pre-emption—Practice—Swamp Lands.

On the trial of an appeal from the commissioners to grant pre-emption to swamp lands, the claimant offered in evidence the affidavit required by law to be filed, for the purpose of showing that he had complied with the statute, but did not read its contents: Held, that the opposite party was at liberty to read the whole of the affidavit, to show that it did not correspond with the case made by the proof on the trial. The affidavit constituted a part of the record of the case, and the parties have a right to use it, to see what the claim is.

This was an appeal by John Hassler from a decision of the commissioners of the swamp and overflowed lands, awarding a pre-emption right to certain lands to Frans Schumacher. The facts of the case may be gathered from the opinion of the court.

T. O. Howe, for the appellant.

E. H. Ellis, for the respondent.

By the Court, PAINE, J. This was a contest between the parties, for the right of pre-empting certain swamp lands, under the provisions of chap. 84, Laws of 1855. The commissioners decided in favor of the respondent, and from their decision the appellant appealed to the circuit court of Brown county, where the lands were situated. By the provisions of the law, the pre-emptor was obliged to file a declaratory statement of his claim, and an affidavit of two witnesses, showing the facts upon which the right to pre-empt was claimed, with the register of deeds of the county where the land was situated, and also a certified copy with the Secretary of State. And on an appeal from the decision of the commissioners, a

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certified copy of this statement, and the affidavits by which it is supported, constitute the return to the circuit court.

In this case the controversy seems to have been in regard to the making of the improvements required by the act. On the trial the respondent offered in evidence the affidavit, for the purpose of showing that he had complied with the statute in filing it, but it was not read. And when the counsel for the appellant was arguing the case to the jury, he desired to read the affidavit, for the purpose of contending that the improvements mentioned in it were of a different kind from those which the respondent had attempted to prove at the trial. This was objected to, and the court prohibited him from doing it; to which exception was taken.

We think this was erroneous, and that the right of the counsel to make such use of the affidavit, can be supported on two grounds. 1. It had been offered in evidence by the other party, not simply "to show that it had been filed," as the court held, but also to show that it was an affidavit such as was required by law to be filed, that it contained the statements necessary for such an affidavit to contain, and that it set forth such improvements made by the respondent as was necessary to be set forth, to lay a foundation for his pre-emption claim. True, it was not offered as any evidence of the *truth* of the statements it contained, but it was offered to show that it contained the necessary statements. For if it was only offered to show that the paper was filed, how could the jury or the court know but it was a blank paper? If it was to be inspected only so far as to see that it was an affidavit, how was it to be known that it was not an affidavit of an entirely different character? Clearly it was offered, as it was necessary to offer it, to show not only that it was filed, but that its contents were such as were required in such an affidavit. And the use which the appellant's counsel sought to make of it, was not at all inconsistent with

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this purpose, for which the paper was in evidence. He did not seek to use it as evidence of the truth of its contents, but simply to show what its contents were; and then to contend that the respondent had supported his declaratory statement by a claim for one kind of improvements, and had on the trial sought to establish another. If this was so, it might have an important influence in determining the justice and truth of the claim. We do not say that it would have shown any such state of things. But we say, that if the counsel contended that it would, it having been offered in evidence to show that it was an affidavit in support of the respondent's claim, and properly filed as such, he had a right to comment upon it, and contrast the character of its claim with that of the proof offered on the trial.

We think it may also be supported on the ground that the statement and affidavit constitute the record of the respondent's claim. They stand for his pleadings in the suit. They constitute the notice, and the only notice he is required to give of the facts upon which he is to rely. The affidavits go with the statement, and both together advertise other claimants what they have to meet. If, therefore, in these, one class of improvements is relied on, and on the trial another, has not the opposite party the right to whatever effect such a departure from the claim set up on the record should have? Has he not a right to refer to the claim set up, and contrast it with that offered in evidence, to show such departure if he can? We think so. It would be as if a party in an affidavit for attachment should set forth one debt, and on the trial offer evidence of another; or in an affidavit for replivin claim one kind of property, and on the trial prove another. In such cases, we think, the other party has a right to refer to any difference between the claim which is set up originally on the record and that which is sought to be established.

We may say that we have no doubt of the respondent's

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right to the benefit of sec. 10, chap. 84, Laws of 1855, if at the time of its passage he occupied the lands as therein required; and that this right would not be defeated by showing that at the time of his original entry, the lands were in market under the laws of the United States, so that he was technically a trespasser on their lands. If he was such trespasser, that was a matter between him and the United States. And the lands having been granted to the state, and the law giving the right of pre-emption expressly to all who occupied at the time of its passage, we do not think there was any intention to go back and raise questions between the occupants and the United States. We think this point is substantially decided in the remarks of this court in *Veeder vs. Guppy*, 3 Wis., 526–7.

But for the reason first stated, the judgment is reversed, with costs, and the cause remanded for a new trial.

COTTERILL et al. *vs.* STEVENS.

ERROR TO CIRCUIT COURT, WINNEBAGO COUNTY.

Heard September 26, 1859.] [Decided January 4, 1860.

Frauds, Statute of.

Where G. was indebted to S., and C. was indebted to G., and it was agreed between C. and S., with the assent of G., that C. should pay S. the amount he was owing G., and S. should give G. credit for the sum paid by C.; Held that an action could be maintained on this promise of C., and it was not a promise to answer for the debt of another, but was a promise by C. to pay his own debt in a particular way.

Where G. had pine logs of the value of $1,000 lying loose in lake Poygan and Wolf river, and sold them to C. as they lay, C. to hunt them up, and C. agreed to pay

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for them by paying a debt due from G. to S., and S. took C. as his paymaster, and then commenced an action against C.; Held that C. could not set up as a defence that the logs were worth more than $50, and the contract to buy was not in writing, nor was there a delivery of the logs: the delivery was a good one, and the agreement to pay S., was a payment for the logs.

This was an action commenced by Julius A. Stevens against Lyman H. Cotterill, Wilbert N. Peaslee, and James Johnson, to recover the sum of $500. The complaint set forth that one Alfred Gilson was indebted to the plaintiff about $1,000, and, at the same time the defendants became indebted to Gilson in the sum of $500, for a quantity of pine logs sold to them by Gilson; and that it was agreed by the plaintiff and Gilson, and the defendants, that the latter should pay the $500 dollars to the plaintiff, and he should extinguish the debt of Gilson to that amount, and that he had given the credit to Gilson. The answer was a general issue. The facts detailed by the evidence, may be gathered from the opinion of the court. Judgment was given for the plaintiff of $500 from which the defendants sued out a writ of error.

Bouck and Edmonds, for plaintiffs in error.

Hodges and Hall, and S. U. Pinney, for the defendant in error.

By the Court, Cole, J. It appears to us that the judgment in this case must be affirmed. It is insisted that the action cannot be maintained, because it is said that the promise of the plaintiffs in error was a collateral undertaking to answer for the debt of Gilson, and not being in writing, is void, by the statute of frauds. But there certainly is considerable testimony in the case going to support the allegations of the complaint, in respect to this promise; and we have no doubt but that the complaint sets forth a good cause of action. The complaint alleges, in substance, that Gilson was indebted to to the defendant in error in a specified amount; that while this indebtedness existed and continued, the plaintiffs in error became indebted to Gilson for lumber and logs sold them by Gilson; that an arrangemennt was entered into between the

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parties to this suit and Gilson, by which it was agreed that Stevens should relieve Gilson from the debt which the latter owed him, and take the plaintiffs in error as his paymasters; that the plaintiffs in error consented to this arrangement, and promised to pay the defendant in error the amount of Gilson's debt to him, as a part consideration of the lumber and and logs which they had purchased of Gilson; that in pursuance of this arrangement, so much of the indebtedness of the plaintiffs in error to Gilson as should amount to Stevens' claim against Gilson, was thereby extinguished, and also the claim of Stevens against Gilson was likewise discharged. As before observed, there was evidence offered upon the trial in support of the case stated in the complaint, and the jury must have found, under the instruction of the court, that the allegations of the complaint, in this behalf, had been established. For, the circuit judge charged the jury, in the special instructions given, that unless they should find that the defendants were actually indebted to Gilson at the time of making such promise to the plaintiff, they must find for the defendants. Also, that unless the plaintiff, at the time of making such promise, agreed to accept the defendants as his only paymasters, and release Gilson, and did release Gilson from all claim upon him, the plaintiff could not recover. In the general charge, the court lays down substantially the same doctrine by instructing the jury that if they found from the whole testimony that the defendants promised Gilson to pay the plaintiff, Gilson consenting thereto, that then the undertaking was not within the statute, unless the debt of the plaintiff against Gilson remained unsatisfied; but if that debt had not been extinguished, then the defendants' undertaking was collateral, and to be binding must be in writing. The court further instructed the jury, that if the defendants, in consideration of the transfer of the logs to them, promised to pay the plaintiff, an action would lie, although the promise

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was not in writing. Under these various instructions, the jury must have found that the plaintiffs in error promised to pay their own debt to Stevens, instead of paying it directly to Gilson, and that the latter consented to this arrangement in order to discharge his own debt. From the instructions, we cannot perceive how the jury could have arrived at any other result. And if such an agreement was made, it was not a promise to answer for the debt of a third person, but rather to pay their own debt in a particular way, namely, by paying it to Stevens instead of Gilson. Such a promise, it has been held, did not fall within the statute. *Emerick vs. Sanders*, 1 Wis., 77; *Barker vs. Bucklin*, 2 Den., 45; *Farley vs. Cleveland*, 4 Cow., 432; *Arnold vs. Lyman*, 17 Mass., 400; *Cabet vs. Harkins*, 3 Pick., 91; *Crocker vs. Higgins*, 7 Conn., 341.

It is further contended, on the part of the plaintiffs in error, that the evidence did not show that the defendants below were indebted to Gilson, in any sum whatever, at the time of the promise, for the reason that the sale of the logs by Gilson to them was void by the statute, as the price of the property exceeded fifty dollars, and there was no written memorandum of the sale. And the circuit court was requested to charge the jury that if they should find the value of the logs, at the price agreed upon, sold by Gilson to the defendants, to be over fifty dollars, and that none of them were delivered to the defendants until after they made the promise to the plaintiff to pay Gilson's debt, that then the plaintiff could not recover. The court refused to give this instruction, and, as we think, properly, under the evidence. The instruction goes upon the theory that the sale of the logs was void, there being no memorandum thereof in writing, and no delivery of the property. But we think there was here something equivalent to the payment of the part of the consideration money, if the understanding of the parties was that the defendents, by paying to Stevens Gilson's debt, discharged that debt, and at the

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same time extinguished, *pro tanto*, the debt due from them to Gilson. It further appears that, by the terms of sale, the defendants were to take the logs where they could find them, and that they did receive a portion of the logs. The defendants, having acted upon the validity of that sale, accepted a part of the property, and treated the contract as binding in law, and they ought not to be permitted, after Stevens has discharged his debt against Gilson upon the strength of their agreement to pay it, to raise this objection.

We do not discover any other question in the case material or necessary to be noticed. The other instructions which were refused, we do not think were correct, as asked to be given.

It follows that the judgment of the circuit court must be affirmed.

PHILLIPS' HEIRS *vs.* SWART et al.

APPEAL FROM CIRCUIT COURT, WINNEBAGO COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

Bills of Exceptions.

Where judgment has been rendered in the circuit court, and no case or bill of exceptions is made, so as to enable the supreme court to examine the merits of the case, on the testimony, the judgment will be affirmed. And there would seem to be no difference in this respect between an action at law or in equity.

This was an action commenced by James M. Phillips, against Henry Swart and David P. Smith. The substantial allegations in the bill are, that the complainant owned the equitable title or interest to certain real estate, by a contract with one Daugherty, by the terms of which he was to pay $3,000; $2,500 of which he had paid. He sold one-half of

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the property to Henry Swart, for the sum of $1,500; at which time it was agreed that they should enter into partnership, in the lumber business; and soon after, Phillips and Swart entered into an agreement, by which it was agreed that Swart was to pay to Daugherty the balance, $500, on the contract, and take the conveyance in his own name, as security; and on the payment of said sum to Swart, he was to deed one-half of the property to Phillips. In accordance with the contract, Swart paid Daugherty, and took a conveyance of the other half of the mill. The answer denies any agreement to enter into partnership, and also denies any agreement to take the title to the other half of the mill for security of the $500 advanced.

After issue was joined, Phillips died, and the action was prosecuted by his heirs. Considerable testimony was taken, tending to establish the facts charged in the bill of complaint, and the complaint was dismissed on the hearing. There was no finding by the court, nor bill of exceptions taken. From the judgment of the court, the complainant appealed.

G. Bouck, for the respondent.

A. K. Brush, for the appellant.

By the Court, Dixon, C. J. The judgment of the circuit court, in this case, must be affirmed. There is no case made, or bill of exceptions settled, as required by law, so as to enable us to look into the evidence, or examine the merits, except so far as they appear from the pleadings. The pleadings show no error, or cause for reversal.

Judgment affirmed.

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HAY & CLARK *vs.* STEAMBOAT WINNEBAGO.

APPEAL FROM CIRCUIT COURT, WINNEBAGO COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

Boats and Vessels—Lien.

The right of a party having a claim against a boat or vessel, for which he may sue the vessel itself, under the boat and vessel act, is not cut off, if before he sues, but within the time in which by the act he was entitled to sue, the boat is sold on an execution issued on a personal judgment against the owner.

The sale of a boat or vessel by the owner, on an execution against the owner, does not divest such boat or vessel of the capacity to owe or be bound for a debt, and to be sued for the payment of the same.

This was an action commenced by Samuel M. Hay and Orson J. Clark, against the Steamboat Winnebago, under the act relating to boats and vessels. The complaint alleged, in substance, that they had a claim against the boat, for the sum of $124, for work, materials furnished in building, repairing, &c., the steamboat. The boat was seized by the sheriff, upon the warrant. The answer to the complaint was put in by A. G. Lull, who claimed as owner, and in substance set forth, that on the 15th day of September, A. D. 1857, a judgment was rendered in the circuit court of Winnebago county, in favor of Joseph H. Turner, against Charles A. Garrett and others, and that on the 29th day of September, of the same year, execution was issued thereon, in the usual form, and and placed in the hands of the sheriff of Winnebago county, who levied upon the steamboat Winnebago, the same at the time being the property of the judgment debtors; and the sheriff afterwards, under the execution, sold the same to Albert G. Lull, who received a bill of sale thereof from the sheriff, and at the time of the commencement of this action, plaintiffs had no right to the boat, and no lien thereon, as against the title of defendant.

The issue thus made was tried by the court, who found, that "by the stipulation of the attorneys of the above parties, all the material allegations of the complaint and answer are admitted, and it appearing to the court by stipulation that the

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complaint of the plaintiffs is true, and that said steamboat Winnebago was seized by the plaintiffs, on the 15th day of May, 1858, and that previous to that day, to wit, on the 6th day of November, A. D. 1857, the said boat was sold to the defendant, Albert G. Lull, on an execution against the owner of said boat. It is therefore adjudged by the court that the defendant have judgment, with costs.

Judgment was entered on this finding, from which the plaintiff appealed.

Bouck & Edmonds, for the appellant.

Lane & Boynton, for the respondent.

By the Court, PAINE, J. The single question presented on this appeal is, where a party has a claim against a boat, for which he may sue the boat itself, under the boat and vessel act, whether his right is cut off, if before he sues, but within the year in which, by that act, he was entitled to sue, the boat is sold on an execution issued on a personal judgment against the owner.

The question is supposed by the respondent's counsel to turn upon the point, whether, by the act, the party had a lien on the boat; and in support of the position that he had not, he relies on the case of *Jones et al. vs. Steamboat Commerce*, 14 Ohio, 408. In that case, under a statute substantially similar to ours, in those provisions which are material to this question, the court held that no lien existed by the act, until the boat was actually seized, and consequently that a prior judicial sale, under the same act, would divest all rights of other parties to pursue the boat under it. The court, in coming to this conclusion, do so, apparently, with considerable doubt, and state that great diversity of opinion had existed among the bar of that state upon the point; and after a careful examination, we have arrived at the opposite result.

In the first place, their act, like ours, contains no provision by which other persons, having similar claims against the

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boat, can be made parties, or derive any benefit from a suit by one. If it did, it would then be analagous to a suit in admiralty, where all the world are parties, and where a sale carries to the purchaser a perfect title, divested of all previous claims or liens. Under such a statute, as all having claims might present them before sale, it might well be said that the intent was that a sale should give a complete title. But under a statute giving expressly to all who have claims, a right to pursue the boat, and making no provision whatever that on a suit by one, any others could derive any benefit from it, it seems to us the very opposite intention is manifest. The distinction between such statutes and proceedings in admiralty, or statutes under which all interested may be made parties, seems most material in determining this question, and has frequently been pointed out by the authorities. *Germain vs. Steamtug Indiana*, 11 Ill., 555; *Ritter vs. Steamboat Jamestown*, 23 Mo., 348; *Steamboat Sea-Bird vs. Beehler*, 12 id., 569.

We think these cases satisfactorily establish that it does not depend entirely on the question of lien or no lien, whether previous rights are cut off, but that even previous liens may be divested by a sale in admiralty, or under a statute authorizing all interested to become parties. But does our statute give a lien? It contains no words giving it expressly, but like the Ohio statute, it authorizes the boat itself to be sued, and to be sold to pay the judgment against itself. The court in Ohio relies on the absence of any express declaration of a lien, and compares the language of this act with that of others, saying that "goods and chattels shall be liable for debts," &c. And because, under such other statutes, there is no lien on the goods until seized, the court infers that the same construction should prevail under this act, and that there is no lien until seizure. But we think this argument overlooks a most important distinction between the two statutes. Stat-

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utes subjecting the goods of debtors to liability for their debts, do not invest them with a capacity to be sued. If they are transferred, either by the debtor himself, or by a judicial sale, before being seized, they are no longer his goods, and do not come within the statute. But the boat or vessel is clothed with a capacity to owe and to be sued. If transferred, it is still the same boat or vessel, and there is nothing in the transfer repugnant to the continued existence of its capacity as a debtor. And we think the case in Ohio itself concedes enough to destroy the ground on which the decision was based. It admits that if the owner of the boat sells it, such sale does not cut off previous claims under the statute. Is not this entirely inconsistent with the position that it stands on the same footing with other property, and that there is no lien? We think so. If the owner of ordinary property, on which there is no lien, sells it, the purchaser, even though he knew that other persons had claims against the owner, in the absence of fraud, takes a perfect title. The court makes a distinction between a sale by the owner, and a judicial sale, admitting that the former would not divest the right, but claiming that the latter would. We think such a distinction cannot be sustained. In the absence of any question as to a fraudulent transfer, an execution creditor can seize and sell no greater interest than the debtor himself could voluntarily transfer. The court concedes that the debtor cannot transfer the boat so as to divest it of its capacity to be sued for any claim under the act. And the same position has been sustained by that court in subsequent cases. *Provost et al. vs. Wilcox et al.*, 17 Ohio, 359; *Steamboat Monarch vs. Potter & Co.*, 7 Ohio St. Rep., 457. This, in substance, establishes the lien, as against any sale by the owner. And that point being arrived at, we can see no foundation for any distinction in favor of purchasers at a judicial sale, on execution upon a personal judgment against the owner. On the contrary, we

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have always understood that the maxim, *caveat emptor*, applies peculiarly to such sales of personal property, and that they cannot convey any interest which the debtor himself could not.

Upon the whole, therefore, we are of the opinion, that while our statute does not expressly declare that the claims which it provides for shall be liens, it substantially makes them so, by investing the boat with the capacity to owe and be sued. And they are not cut off by any sale, which would not have the effect to cut off admitted liens. The legislature must have had in view the general maritime lien. And although they did not follow its analogy so far as to provide that all interested could be made parties to a suit, yet they do place these claims upon the same basis on which those liens rest, and provide for giving effect to them in a similar manner, by a proceeding against the vessel. The nature of the maritime lien is thus stated in *Dudley vs. Steamboat Superior*, 3 Am. Law Reg., 630: "The former have their origin in the fact or the presumption of the fact, that credit is given, not to the owner or master, but to the vessel; and by the admitted doctrine of the maritime law, it attaches from the time the credit is given, and is equivalent to an express hypothecation of the vessel. It adheres to the *res*, as a subsisting and efficient lien, wherever it goes, and into whosesoever hands it may pass." These liens were enforced by a proceeding against the vessel; and when our legislature provided that certain debts might be contracted on the credit of the vessel, that the vessel might itself be sued as the debtor, and sold to pay the debt, it seems to us to provide for all that is necessary to a lien, and to have made it superfluous to declare that a lien should exist. This view seems supported by the fact, that the right to bring the action is limited to one year after the claim accrues, which has since been diminished to three months, with respect to boats used entirely on the inland waters of the state. Unless

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the intent was to give a right not liable to be cut off, if any creditor of the owner should happen to seize the boat first, under its general character as property, why confine the right to one year, or three months? We cannot account for this, except on an intent to establish a privileged claim.

We think, therefore, the boat was liable to this suit, at any time within the year after the claim accrued. And following the intimation of the court of Ohio, in the case cited from the 17th, we may say that a sale under execution against the owner, no more repeals this statute, than a sale by the owner himself.

And this is no hardship upon the purchaser. The law is a public law. He is bound to know it. The thing which he buys is invested by law with a capacity to owe and be sued, and he buys it knowing its capacity.

The claims intended to be protected by this act are of a meritorious character, and we think it should receive a liberal construction, so far as may be necessary to afford that protection which was evidently designed.

The judgment is reversed, with costs, and a new trial awarded.

EMERSON et al. *vs.* STEAMBOAT, SHAWANO CITY.

APPEAL FROM CIRCUIT COURT, WINNEBAGO COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

Boats and Vessels—Lien—Limitation.

Where a party had furnished materials for the construction of a steamboat, and had given a credit for the period of time within which he could commence an action against the boat, under the boat and vessel act, he cannot commence the action against the boat after the expiration of the credit.

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The statute concerning boats and vessels, gives those claims which may be prosecuted under it a preference in the nature of a lien over other debts of a general nature existing against the owners, and such claims cannot be defeated by a sale by the owners, provided the proceedings are had within the time limited by the act.

The limits prescribed by the act concerning boats and vessels, within which actions should be commenced against the boat or vessel itself, should be measured from the time the services were performed, or materials actually furnished, and not from the expiration of the period of credit which the parties may agree upon.

A complaint against a boat, avering that she was used "in navigating the waters of the state of Wisconsin, does not show that the vessel was used *exclusively* in navigate the *inland* waters of the state, so as to make it necessary to bring an action for supplies against it within three months.

This action was commenced by George F. Emerson & Co., against the steamboat "Shawano City," for the price of a force pump. The facts of the case can be readily gathered from the opinion of the court.

Bouck & Edmonds, for the appellants.

By the Court, DIXON, C. J. We are of the opinion that the appellants' counsel cannot be sustained in the point upon which they rely for reversing the judgment appealed from. The force pump, for the price of which the action is brought, was furnished by the appellants for the use of the boat, on the 13th of June, 1858, on a credit of 3 months. The time of credit having expired, and the price not having been paid by the owners of the boat, on the 4th of Dec, 1858, this suit was instituted, and the boat seized under the statute authorizing proceedings against boats and vessels for the collection of demands. To the complaint there was a demurrer for want of a statement of sufficient facts to sustain the action. The ground of demurrer relied upon, was that the suit was not commenced within three months after the cause of action accrued, as required by chapter 99 of the General Laws of 1858, incorporated into chapter 150 of the Revised Statutes of 1858. That act amends section 21 of chapter 150, by providing that all actions against boats and vessels navigating the inland

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waters of this state exclusively, shall be commenced within three months after the cause of action shall have accrued, and not after that period. The demurrer was sustained. We have decided at this term, in the case of *Hay et al vs. Steamboat, Winnebago, supra*, 428, that the effect of the statute was to give those claims, which may be prosecuted under it, a preference in the nature of a lien, over other debts of a general nature existing against the owners, and that such claims cannot be defeated by a sale by the owners, provided the proceedings are had within the time limited by the act. This being the intention of the legislature, there can be little doubt of the further intention, that the limits prescribed should be measured from the time the services were performed, or the materials actually furnished, and not from the expiration of any possible period of credit which the parties might agree upon. Such does not seem to be the policy of the statute. If it were, it would enable the owners and particular creditors to place the property for an indefinite length of time beyond the reach or control of general creditors. If a credit of three months could be given, and the action be sustained within three months from the expiration of that time, why, on the same principle, might not a credit of five or ten years be given, and still the lien be prosecuted? Such is not the spirit and intent of the act. Although a cause of action may not, in general, be said to have *accrued* until the time of credit, if any, has expired, yet in giving a construction to the particular words of a statute, we are to look to the whole act, and from it determine the sense in which they are used, so as to give effect to the legislative intent. The verb "to accrue" is often and properly used to convey the same idea as the verb "to arise." Such is evidently the sense in which it is here used. A cause of action may be said to arise, when the contract out of which it grows is entered into or made. On this point the demurrer was properly sustained.

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There is, however, an error apparent of record, but not noticed by counsel, for which, we think, the judgment must be reversed. The general rule established by sec. 21, is that actions like the present may be prosecuted within one year after the causes thereof accrued. The exception made by the amendment is that *actions against boats and vessels navigating the inland waters of this state exclusively*, shall be brought within three months. There is no allegation in the complaint that the boat was used exclusively in navigating the inland waters of the state. The averment is, that she was used "in navigating the waters of the state of Wisconsin." All the waters of the state of Wisconsin are not inland. Boats and vessels used upon Lake Michigan and the Mississippi River, navigate the waters of this state, and may be so run as to navigate them exclusively, and yet not touch upon our inland waters at all. For this reason it is evident that the demurrer is not well taken. The record shows no admission that the boat was used upon inland waters exclusively, and the court could not presume it.

The judgment is reversed.

SANBORN *vs.* HUNT.

ERROR TO CIRCUIT COURT, WINNEBAGO COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

Replevin—Goods Sold and Delivered.

Where S. sold a stock of goods to M., taking a mortgage as security for his pay on the goods, and after forfeiture M. re-delivered the goods to S. with other goods originally belonging to M., from which last S. was to receive enough to replace

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any deficiency which on taking an inventory might be found in the stock sold by S., and return the balance to M.; but, before completing the inventory, the sheriff levied upon the whole stock by virtue of an execution issued against M., and took them from the possession of S., who brought replevin against the sheriff for taking the goods, &c.: Held, that as to that part of the stock sold to M., S. took an absolute title without any further act on the part of either party; but as to that portion originally belonging to M., and from which S. was to make up the deficiency after taking the inventory, the title would not pass until the inventory was completed.

The case of *Sewell vs. Eaton*, 6 Wis., 490, considered and approved.

The facts in this case are sufficiently stated in the opinion of the court.

Abell & Bouck, for the plaintiff in error.

By the Court, Cole, J. We are of the opinion that some of the instructions given by the circuit judge to the jury on the trial of this cause were erroneous. The circuit judge charged the jury, among other things, that if they should find that the plaintiff was in possession of the goods in controversy under the bill of sale or contract offered in evidence, and if any thing remained to be done under the same, such as taking an inventory, measuring goods, &c., that then the defendant was entitled to recover. And, again, he instructed the jury that the property did not become vested in the plaintiff, and that the plaintiff acquired no interest therein until an inventory was taken, as provided by the agreement between the parties, and that consequently the plaintiff had no claim or interest in and to the property.

It appeared from the evidence in the case that the plaintiff in error sold a certain stock of drugs, medicines, &c., to one Hiram Miltimore, on the 19th of August, 1857, upon credit, taking four promissory notes for the consideration money which notes were secured by a chattel mortgage upon the stock of goods sold, and other goods belonging to Miltimore. Miltimore not being able to meet his notes as they became

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due proposed to the agent of Sanborn, that the goods remaining unsold of the Sanborn stock should be taken back, and that a sufficient amount of the goods originally belonging to him should also be taken by Sanborn to supply any deficiency which might be found to exist in such stock when an inventory should be taken; and to indemnify Sanborn for any expenses, &c., which he might have incurred in consequence of Miltimore's inability to meet his engagements. Thereupon, on the 17th of December, 1857, an agreement in writing was entered into between the parties which after referring to the time and condition of the sale made in August; and that Miltimore had become unable to meet his notes, contains, among other things, the following clause: "And, whereas, the said party of the second part has been put to great loss and inconvenience on account thereof, (the inability of Miltimore to meet his notes); now, therefore, in consideration thereof, and of the covenants and agreements hereinafter contained the said party of the first part agrees to sell and does hereby sell to the said party of the second part all the right, title and interest of said party of the first party in and to the above described property heretofore purchased of the said party of the second part." Some subsequent negotiations were had between the parties in reference to abrogating this ageeement and permitting Miltimore to retain possession of the goods, upon condition that he paid the first note given in August, but these subsequent agreements were not fulfilled, and, therefore, they need not be further noticed. Sanborn, by his agent, went into possession of the store and stock of goods under the agreement of the 17th of December, and was in actual possession of the entire stock formerly belonging to Miltimore, taking an inventory when the same was levied upon by the defendant in error, who was the sheriff, under executions issued upon judgments against Miltimore.

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From these remarks the materiality of the instructions before cited become apparent. The circuit judge charged the jury that though the plaintiff was in possession of the goods under the bill of sale; yet, if any thing remained to be done, such as taking an inventory, &c., that the action could not be maintained. Now, we think it very clear, from the whole scope and meaning of the contract under which Sanborn went into possession of the goods, more particularly from the language of the clause just referred to, that it was the intention of Miltimore to transfer the title to all the goods which he had purchased of Sanborn, and of Sanborn to accept such goods without any further act in the premises. The sale of these goods was intended to be an absolute transfer and the taking of the inventory was only for the purpose of ascertaining the amount of the deficiency. Such being the case, the sale of those goods was absolute and complete. *Sewell vs. Eaton*, 6 Wis., 490; and authorities in the opinion. In relation to the stock of goods which originally belonged to Miltimore it might perhaps be correct to say that the title to them would not pass until an inventory had been taken and the deficiency in the Sanborn stock ascertained. But this could not be true of the latter stock, about which nothing further had to be done to complete the sale. Since, therefore, the circuit judge did not discriminate in his instructions as to the law applicable to these different stocks of goods, but held that the plaintiff in error acquired no title to any of the property, until an inventory had been taken, we think a new trial must be granted upon that ground.

The judgment of the circuit court is reversed, and a new trial ordered.

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KELLOGG *vs.* BALLARD.

ERROR TO CIRCUIT COURT, OUTAGAMIE COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

New Trial.

Where a party to a cause of action relied on the evidence of the opposite party, but took no steps to secure his attendance, and when the cause was called for trial the latter party, who had been in attendance on the court, suddenly disappeared, and the trial proceeded without his evidence, the court will not, for that cause, set aside the verdict and grant a new trial.

This was an action commenced by Miles L. Kellogg, before a justice of the peace, against Anson Ballard, and appealed to the circuit court. The defendant was examined before the justice as a witness in the cause, and was in attendance at the court on the day previous, and also a few minutes previous to calling on the cause for trial, when he could not be found to be notified or subpœnaed. After trial the plaintiff moved for a new trial, which was denied, and this writ of error was sued out on the judgment.

R. P. Eaton, for plaintiff.

F. Packard and G. Bouck, for the defendant.

By the Court, Cole, J. We do not think there was any abuse of discretion on the part of the circuit court, in denying the motion made for a new trial in this case. The grounds relied on in the motion were, substantially: 1st, That the appellant, or his counsel, depended upon the attendance of the respondent upon the trial, and was surprised by his sudden disappearance from court; and 2d, That the clerk gave testimony contrary to what was expected he would give. It is true courts sometimes grant a new trial where a party has been taken by surprise, as when a witness, who has been

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duly subpoœnaed, absents himself at the moment of trial, so that the party relying upon him is unexpectedly deprived of the benefit of his testimony. But a party relying upon the testimony of a witness, should use due diligence in order to secure the attendance of such witness. He has no right to wait until an hour or so before his case is called on for trial, and then place fees and a subpœna in an officer's hands with instructions to find the witness and serve the subpœna, and in the event the witness is not found, take his chances at a trial, and when beaten, say he was surprised by the absence of the witness, and make that a ground for a new trial. It appears that this was the extent of the care and dilligence used by the appellant, in order to secure the personal attendance of the respondent, and we do not deem it sufficient, or that it makes out a case of surprise. The respondent was in attendance upon the court the day previous, and with ordinary attention and diligence, might have been subpœnaed. But this the appellant neglected to do. Neither did he move to put off the trial on account of the absence of the respondent, but proceeded with his cause, relying upon the testimony of the clerk to make out his case before the jury. The clerk, it seems, knew nothing about the matter he expected to prove by him. But surely the appellant should have seen to it that the witnesses were present to make out his case, before proceeding to trial. We think the inattention of the appellant to his case, and the want of preparation for the trial, were inexcusable upon his own showing, and that he ought to abide by the consequences thereof.

The order of the circuit court denying a new trial, is affirmed, with costs.

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HENDRICKS *vs.* VAN CAMP.

APPEAL FROM CIRCUIT COURT, OUTAGAMIE COUNTY.

Heard September 27, 1859.] [Decided January 4, 1860.

Appeal—Practice.

An appeal will be dismissed unless there is a proper return of the record of the cause from the circuit court.

The facts in this case can be gathered from the opinion of the court.

F. Packard, for the respondent.

R. P. Eaton, for the appellant.

By the Court, PAINE, J. This was an appeal from an order refusing to strike from the files a judgment roll. The return consists of a bill of exceptions containing the affidavit used on the hearing and reciting the facts that an order was made, but there is no certified copy of the order, as required by sec. 5, chap. 139, R. S., 1858. There have been several affidavits filed outside of the record, among which is one by the attorney for the appellants stating the reasons why he did not file an affidavit of merits in the court below, and another by the attorney of record for the respondent stating that the attorney who appeared at the hearing of the motion was not the attorney of record, but was only employed by him for that special occasion, and that no notice of settlement of bill of exceptions had been served on him, and that his client at the time the appeal was taken was insane, and that proceedings were pending for the appointment of a guardian. This method of presenting matters on appeal is a little unusual, though perhaps, under the circumstances, the latter affidavit was properly presented.

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We have concluded to dismiss the appeal, for want of such a return as the statute requires.

The appeal is dismissed with costs.

NORTON *vs.* KEARNEY, et al.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard November 23, 1859.] [Decided January 12, 1860.

Assignment—Contract—Estoppel—Fraud—Trespass.

All contemporaneous agreements between the same parties and in relation to the same subject matter, are to be taken together, and construed as one instrument, for the purpose of determining the character of the transaction, and the intention of the makers.

Where A., being surety for B. upon certain promissory notes, received from him a bill of sale of certain goods purporting to be absolute, but at the same time executed and delivered to B. a written agreement, in which he recited the sale, and in consideration thereof promised, first, to pay in full the demands upon which he was surety; and, secondly, if the proceeds of the goods, when sold by him, should exceed the amount of such demands, to faithfully pay the overplus to the other *bona fide* creditors of B., *pro rata*, according to the amounts of their respective debts, both instruments are to be construed together, and in law, constitute an assignment for the benefit of creditors.

An assignment in which the assignee is "to dispose of the property to the best advantage in his discretion," is valid, and does not imply an authority to sell on credit. The discretion thus vested must be understood to be a legal discretion, to be exercised within the limits of the law in such cases. There being ample room for the exercise of a discretion strictly legal, the law will not presume that the assignor intended the exercise of one which is illegal.

The cases of *Hutchinson vs. Lord*, 1 Wis., 286, and *Keep vs. Sanderson*, 2 id., 42, considered and distinguished.

The law always presumes in favor of innocence and against fraud. It will never infer evil intentions and dishonest purposes from language or conduct which is susceptible of upholding those which are good and honest.

In a complaint for trespass for taking and carrying away goods assigned to the plaintiff for the benefit of creditors, it is improper, and foreign to the purpose of the action, to aver and prove that a mistake has occurred in drawing the assignment. Such a mistake could only be corrected in a direct proceeding for that purpose, where the creditors are made parties.

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An answer to a complaint *de bonis*, which justifies under a writ of attachment, without averring an indebtedness on which the writ issued, is not sufficient to authorize the defendant to attack the title of the plaintiff by showing that the sale to the plaintiff was fraudulent and void as against creditors.

The case of *Jones vs. Lake*, 2 Wis., 210, considered and approved.

In an action of trespass against several defendants, it is erroneous to instruct the jury that an appraisal, made by one of the defendants, of the goods taken, was conclusive of their value as to all the defendants.

An estoppel *in pais* happens where a party makes a statement or an admission, with the intention of influencing the conduct of another, who acts upon the confidence of such statement or admisson, and will suffer injury if the party is permitted to deny it.

This action was commenced by Nelson B. Norton, against John Kearney, Charles J. Jones, and Washington I. Butler. The complaint set forth that one Charles N. Norton and Charles Nairn were indebted to the plaintiff for money lent, &c., $487; also that he became surety for them on several promissory notes, amounting to $708,85, with interest, and to secure the payment of the same, Norton and Nairn sold and assigned a stock of merchandise, then in the store of one Barnes, at Burlington, Racine county, and put him in possession of the same: that the consideration was that the plaintiff should cancel his debt from Norton and Nairn, which he had done; and an agreement that was then entered into that he should pay all the notes on which he was surety, and save them harmless; that he should dispose of the stock to the best advantage, in his discretion, and if the proceeds should exceed in amount the indebtedness to him and the notes, then he should pay the overplus to the other *bona fide* creditors of Norton and Nairn, *pro rata*, according to their demands. This agreement was reduced to writing and signed by the parties; but in doing so, by an oversight and mistake in drawing it up, the debt due to him was omitted, as also one note of $75 dollars; that he had paid off all the demands. That a few days after he had taken possession of the stock of goods, the defendants entered the store and took and carried away the goods, &c., and he demanded judgment for their value.

The answer of the defendants is, 1st, a general denial. 2d, Justification: that Kearney was deputy marshal, and the others acted by his direction; and that he had three writs of attachment, issued out of the United States District Court for the district of Wisconsin, against Norton and Nairn, and

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against Norton and Perkins, who were the partners previous to Perkins selling out to Nairn; and that all that was done by the defendants, was done by virtue of and in pursuance of said writs of attachment.

On the trial the plaintiff read the following bill of sale:

"For value received, we, the undersigned, do hereby sell and fully transfer and convey to Nelson R. Norton, all the goods, wares and merchandise now in the store of C. P. Barnes, in the village of Burlington, Racine county, Wisconsin, kept by us. Received payment in full, by the obligation of said Nelson R. Norton, bearing this date, made by him to us. Witness our hands and seals, this, the 26th of November, 1856."

CHARLES N. NORTON, (seal.)
CHARLES NAIRN, (seal.)

n said sale, the plaintiff executed a written agreement in the words and figures following, to wit.:

"Whereas the firm of Norton and Nairn, merchants, of Burlington, Wisconsin, have sold and conveyed to me their entire stock of goods, wares and merchandise, at Burlington, aforesaid: And whereas I have heretofore become surety for them, and obligated to pay the following debts, viz:

"One promissory note to Ebenezer Adams, of about $225, including interest. One promissory note to J. R. Mills & Co., for $358 about, besides interest; and one note to John Toomer, of $55 and interest.

"Now therefore, in consideration of the premises, I hereby promise to pay said demands in full, and save said Norton and Nairn, and each of them, harmless and indemnified of, and from all costs and expense, for or on account of the same.

"And I further promise said Norton and Nairn that I will dispose of said goods, wares and merchandise to the best advantage, in my discretion; and, if the proceeds thereof, when sold by me, shall exceed in amount the sums above specified, I will faithfully pay such overplus to the other bona fide creditors of said Norton and Nairn, pro rata, according to their respective amounts of such credits."

NELSON R. NORTON. (seal.)

Burlington, November 26th. 1856.

The plaintiff also proved by Charles N. Norton, that the goods had been delivered, and that there was a mistake in drawing the assignment, as charged in the complaint. This

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last was objected to and admitted. He also proved that the defendants had broken open the store and taken possession of the goods, and finally sold them. The goods were appraised by defendant Jones and one Sheldon, after they were attached, and all the defendants acted in taking, holding, and selling the goods. The plaintiff proved his possession of the goods from the time of the sale until they were taken by the defendants. He also proved that the inventory made by the appraisers, at New York prices, amounted to $2,333.

The defendants proved the levy under the attachment, as answered, and also attempted to prove some statements made by the plaintiff. The court charged the jury that "it was claimed by the plaintiff that a portion of the consideration for which the property was transferred to plaintiff, was, by mistake, omitted from the written agreement; that it was competent for the plaintiff to show that mistake on the trial, by parol evidence; that the consideration or interest of the plaintiff, mentioned in the paper, was not very important in this action, but that he could prove the agreement as it really was, and that he was entitled to recover according to the facts so proved; that the note of $75 to Northop, and the loan of $487, were, if proved to their satisfaction, as much a part of the consideration for that agreement, as though they had been specified in the writing, and that the plaintiff had the same right to recover for them, if satisfactorially proved, as he would have had if they had been included in the written agreement.

"The sale in this case was not an absolute and unconditional sale, and by it the plaintiff did not become the absolute and unconditional owner of the property. Neither was it a pledge of the property to the plaintiff to secure his claims, for in that case, the surplus would belong to the pledgors, Norton & Nairn; but in this case, the surplus was to be divided among the creditors of Norton & Nairn.

"It bears some resemblance to a chattel mortgage, and comes nearer to that than to an absolute sale, or a pledge, but I do not think we can regard it as a chattel mortgage. What is it then? I am of the opinion that it must be considered and held to be an assignment for the benefit of all the creditors, with a preference to the plaintiff, and I therefore instruct you, that if you are satisfied that Norton & Nairn owed plaintiff, or that the plaintiff was liable for the debts specified, then the transfer was a good and valid transfer, as an assignment for

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the benefit of creditors, and the property was not afterwards subject to be levied on or attached as the property of Norton & Nairn, but if you find that they were not indebted to the plaintiff, then the transfer was void, and the stock was liable to attachment.

"If this had been an absolute purchase by the plaintiff, of $2,000 worth of goods to secure a debt of twelve hundred, it would have been fraudulent, if plaintiff knew, at the time of the purchase, that Norton & Nairn were in failing circumstances. The plaintiff, if entitled to recover at all, is entitled to recover the full value of the goods; and, inasmuch as one of the defendants made the appraisal of the goods after they were attached, I instruct you that the defendants in this suit are estopped to question the correctness of that appraisal, and therefore your verdict, if for the plaintiff, should be for the amount of that appraisal, with interest from the time of the taking of the goods by the defendants.

The counsel for the defendants then requested the court to instruct the jury that if the transfer of the stock of goods by Norton & Nairn to the plaintiff was made, partly for the purpose of indemnifying the plaintiff, partly for the purpose of putting the goods beyond the reach of other creditors, it was fraudulent and void as to creditors. Also, that if the jury believe, from the evidence, that the plaintiff knew that Norton & Nairn were embarrassed at the time of the transfer, then the transfer was void, except to the extent of the indebtedness of Norton & Nairn to the plaintiff, if any, and the liability of the plaintiff for the firm. That, if they found that the $487 was furnished by the plaintiff to his son, then the firm of Norton & Nairn were not responsible to plaintiff for that sum, and he cannot recover in this action for that claim. Which instruction the court refused to give, as requested; but charged that such was the law, unless the jury believed that the money went into that business, and the firm adopted it as the firm liability. That if they believed that the $487 was an advancement made by plaintiff to his son, without any agreement or understanding at the time, that it would be repaid, then it is not a debt due to the plaintiff, and that he is not entitled to recover for it in this action. That the transfer to plaintiff was only in the nature of a pledge, or chattel mortgage, to secure the amount actually his due from Norton & Nairn, and that the interest of Norton & Nairn in said property was subject to attachment and execution. Which instructions the court refused to give.

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The issue was then submitted to the jury, and they returned a verdict for the plaintiff for $2,639 10; upon which judgment was entered, and the defendants appealed.

J. W. Cary, for the appellant.

Lyon & Adams, for the respondent.

By the Court, DIXON, C. J. There is no rule better established than that all contemporaneous agreements between the same parties, and in relation to the same subject matter, are to be taken together and construed as one instrument for the purpose of determining the character of the transaction, and the intention of the makers. It is unnecessary to cite authorities in support of this rule, as they are familiar to every lawyer. Accordingly the bill of sale of Norton & Nairn to Nelson R. Norton, and his agreement back to them, made on the 26th of November, 1856, are to be construed together. When so considered, they clearly amount to an assignment for the benefit of creditors with a preference to those creditors, to whom Nelson R. Norton stood in the relation of surety for the assignors. No particular form of words or instrument are necessary to contribute a valid assignment of chattels or things in action. Any valid transfer by which the uses and trusts for which the property is assigned, and to which it is to be appropriated by the transferee, are intelligibly indicated and declared, is an assignment. Nothing can be clearer than that Newton, the assignee, received the goods for the purpose of disposing of them, and applying the proceeds, *first*, to the notes upon which he was surety, *secondly*, to the payment of the other debts of Newton and Nairn, *pro rata*. The only feature in which it differed from ordinary assignments made with a view to insolvency, except in matters of form, is that the assignee covenanted absolutely to pay the preferred debts in full and to save the assignors harmless from all costs and expenses on account

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thereof. This in no way changed the character of the instrument. If assignors see fit to indemnify themselves by the insertion of such covenants with the assent of the assignee, there can be no objection to their doing so. The fact that Norton & Nairn were insolvent, and contemplated a total suspension of business, tends strongly to show that an assignment was intended. Numerous cases are to be found in the books where instruments though not in the form of assignments have been held to be valid and binding as such.

In *Sharpless vs. Welch*, 4 Dall., 279, A being indebted to several persons in Philadelphia remitted a bill to B in his favor, saying at the same time, that in a few days he would send directions about its disposition, which he accordingly did, and appropriated the proceeds of the bill among certain of his creditors; subsequently one of them levied a foreign attachment upon A's funds in the hands of the acceptor of the bill, and of B. It was held that B became a trustee for the creditors, from the time of receiving A's appropriation, and that the creditors thereupon acquired such an interest in the trust fund as could not be disturbed or affected by the attachment. In *Watson vs. Bagaley*, 12 Pa. St. R., 164, a power of attorney to collect certain moneys and pay them to certain creditors, in a prescribed order of preference, was holden to be virtually an assignment. In *Beers vs. Lyon*, 21 Conn., 604, an absolute bill of sale by a debtor in failing circumstances was held to be an assignment, and the vendee a trustee of the property.

As an assignment for the benefit of creditors it does not fall within the principles of *Hutchinson vs. Lord*, 1 Wis., 286, and *Keep vs. Sanderson*, 2 Wis., 42. In those cases it was determined that a clause in the assignment authorizing the assignee to sell and dispose of the assigned property upon such *terms and conditions*, as in his judgment might appear best, and most for the interest of the parties concerned; in-

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cluded a power *to sell upon credit*, and therefore rendered the transfer fraudulent and void. In the present case those words do not occur, nor are those of an equivalent meaning used. The language used is: "And I further promise said Norton & Nairn that I will dispose of said goods, wares and merchandize to the best advantage, *in my discretion*," &c. It is contended that the words, "in my discretion," are as broad and comprehensive as the words "upon such terms and conditions," and necessarily imply an authority to sell upon credit. We are of opinion that the discretion here vested must be understood as a legal discretion, that is, a discretion to be exercised within the limits which the law fixes in such cases. There is ample room for the exercise of this discretion without transcending any rule of law. It must be held to apply to the mode of sale as to whether it shall be public or private, by the quantity or single article, and the various other details of such transactions. By this construction the instrument is sustained and its language satisfied.

We have examined the cases of *Kellogg vs. Slawson*, 1 Kern., 302, and *Nye vs. Van Huson*, 6 Mich., 329, cited by counsel for the defendant in error, and are abundantly satisfied with the reasoning of the courts, as applied to the facts of this case. In the former case, the earlier New York decisions holding assignments, authorizing the trustees to take possession of the property, and sell and dispose of the same, *upon such terms and conditions* as in their judgment might appear best, and most for the interests of the parties concerned, invalid, as authorizing a sale upon credit, are directly overruled by the court of appeals; and an assignment containing such a clause is held valid. The reasons given are, that the discretionary power conferred by the expression, "terms and conditions," is to be exercised within legal limits; that the law will not imply an unlawful discretion, not given by express words, and will not defeat the instrument by inferring

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that the assignor contemplated an unlawful act; but that legal intendments are always in favor of its validity. It was further observed that there was ample room, within legal bounds, for the exercise of the discretion conferred, whilst there was no express authority given to sell on credit, or to do any other thing prohibited by law. Various authorities are cited in support of the construction given. *Nye vs. Van Huson* is to the same effect. Both appear to have been determined, in accordance with the fundamental principle, that the law always presumes in favor of innocence, and against fraud; that it will never infer evil intentions and dishonest purposes from language or conduct which is susceptible of upholding those which are good and honest; its maxim being: "*Odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum, et malum, magis de bono, quam de malo, præsumendum est.*"

The allegation in the complaint, that a mistake occurred in drawing the assignment, by which the debt due the respondent was not named in the list of preferred claims, seems altogether foreign to the purposes of this action. If such mistake occurred, the rights of the parties are no way changed or affected by it. The instrument being *prima facie* valid as an assignment, it could make no difference with the plaintiff's right of recovery, as against supposed trespassers, whether the order in which the debts were to be paid was or was not that intended by the parties. That was a matter in which creditors alone were interested, and with which the defendants, when prosecuted in the character of wrong doers, had nothing to do. It could only be inquired into in a direct proceeding to correct it, where all persons interested could be made parties. The assignment, in effect, provided first, for the payment of the debts particularly named, and then for a distribution of the surplus proceeds, if any, *pro rata* among all the other creditors of the assignors. How could proof that the assign-

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ors intended to include one of the latter class of creditors among the former, affect this action? It is evident that it could neither strengthen nor impair the validity in law of the instrument. It presented ground for equitable relief, but such was not the object of this suit. The proper parties were not before the court. It is equally obvious that it was neither directly or indirectly connected with the question of fraud *in fact*. If the defendants had admitted the mistake, it would have placed them in no worse situation; nor would it in any possible state of proof have relieved the plaintiff in the least. The defendants should have moved to strike it from the complaint, as irrelevant; and on their failing to do so, the circuit court should have excluded the testimony offered under it, as wholly immaterial. This view strips the case of many objections and exceptions, on the part of the appellants, some of which appear otherwise well taken, but all of which it becomes unnecessary for us to consider.

We shall, therefore, only notice such as do not grow out of the admission of this improper testimony. The declarations of the assignors, made after the assignment, as to their circumstances and intentions, were properly held inadmissible. They were mere hearsay. *Roberts vs. Justice*, 1 C. & K., 93; (47, E. C. L., 93;) *Paige vs. Cogwin*, 7 Hill, 361; and cases there cited.

The position assumed in this court, that the defendants were not entitled, under their answer, to attack or impeach the transfer as fraudulent, as against creditors, is no doubt correct. This objection does not appear to have been taken in the court below. If it had, no doubt the evidence offered for that purpose would have been excluded, unless an amendment of the pleadings had been allowed, upon a proper application for that purpose. The answer alleges no indebtedness from Norton & Nairn to the attaching creditors. The affidavits were not proof of it, and if they were, they were inadmis-

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sible for that purpose, without a proper allegation in the answer. It was held by this court, in *Jones vs. Lake*, 2 Wis., 210, that the party attacking a sale as fraudulent and void, as against creditors, must first show his relation of creditor.

That part of the charge in which the jury were instructed that inasmuch as the defendant, Jones, was one of the appraisers who valued the goods, at the time they were seized in attachment, all the defendants were estopped from denying the correctness of the appraisal, and that if they found for the plaintiffs, their verdict should be for the appraised value and interest, from the time of taking, was clearly erroneous. In no view was the act of appraising the goods one which ought to preclude the defendant, Jones, from showing their true value; much less his co-defendants, who were in no way connected with it. An estoppel *in pais* happens where a party makes a statement, or admission, either expressly, or by implication, with the intention of influencing the conduct of another, and that other acts upon the confidence of such statement or admission, and will suffer injury if the party is permitted to deny it. In what way did the appraisal made by Jones influence the conduct of the plaintiff, or how could he have been injured by his being allowed to gainsay it? The plaintiff was an utter stranger to it, and could in no way have been influenced by it. It would be strange indeed if persons called upon and compelled by law to act as appraisers, under such circumstances, should afterwards, in an action against them for wrongfully intermeddling with the goods, be held liable to pay twice or three times the value of the goods appraised, as a penalty for an honest, but erroneous exercise of judgment, and still more strange, if all others jointly liable with them in the action should likewise be liable for the same penalty.

The judgment of the circuit court must be reversed, and a new trial awarded.

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BAXTER *vs.* THE STATE OF WISCONSIN.

ORIGINAL ACTION FOR MONEY CLAIMED.

Heard October 11, 1859.] [Decided January 12, 1860.

Practice—Limitations.

Proceedings in suits against the state are to be conducted in accordance with the provisions of the code, except so far as the law allowing these actions to be brought may otherwise specially provide.

The state may plead the statute of limitations to an action against it, and is entitled to this defense the same as any other defendant.

The facts in this case will be readily gathered in the following opinion, and in the same case reported in 9 Wis., 38.

J. H. Knowlton, for the plaintiff.

G. Bouck, Att'y General, for the state.

By the Court, PAINE, J. After the demurrer to the complaint was overruled, the Attorney General filed an answer, containing a general denial of all the allegations of the complaint, and several other defenses, among which was the statute of limitations. The counsel for the plaintiff has moved to strike out the general denial, and filed a demurrer to the rest of the answer.

The motion to strike out is based on the assumption that a general denial is a mode of pleading authorized only by the code, and that the code does not apply to suits against the state. We think, however, that it does, except so far as it may be modified by the statute authorizing such suits. That statute does not attempt to prescribe, in detail, the system of pleading. It says the complaint shall set forth "fully and particularly, the nature of the claim," and then leaves

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the attorney general to "answer or demur." A suit under this statute before the code, may have been more analogous to a suit in equity, than one at law. But while it was in force the code was adopted, which abolishes all distinction in the forms of proceeding, and establishes a single uniform method in actions both at law and in equity. It was designed for "courts of record" in the state. And we think it in accordance with the evident design of the legislature to hold, that proceedings in suits against the state, are to be in accordance with its provisions, except so far as the law itself may otherwise specifically provide. The motion to strike out, is therefore overruled. Though how far it is proper or competent, under the code, to join a general denial with other defenses which admit a portion of the allegations of the complaint, is a question not presented.

We think the demurrer well taken to all the answer except that which sets up the statute of limitations. The other matters were substantially determined by the decision on the demurrer to the complaint. But after a careful examination, we have come to the conclusion that the statute of limitations is a good answer to the complaint. This action is certainly within the letter of the statute. It requires all actions on contracts to be commenced within six years after the cause of action accrued. This is an action on a contract between the plaintiff and the state, and is barred by the statute, unless there is some sufficient reason to deprive the state of the benefit of this plea. Is there any such reason? No satisfactory one was suggested on the argument, and none has occurred to us. Certainly none is to be derived from the maxim *nullum tempus occurit regi*, under which the king, and in this country the state, have been held not to be bound by the statute of limitations. This exemption was a part of the kings's prerogative. The reasons of it are very fully stated in *United States vs. Hoar*, 2 Mason, 312;

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and also appear in Bacon's Abridgment, Title, Prerogative. The rule established is that the statute cannot be set up as a defense to an action by the king or the government. But this being a matter of prerogative, founded upon the public good, and the protection and preservation of the public interest, instead of furnishing any support for the position that as a defendant the state cannot have the benefit of the statute, would fully sustain the opposite conclusion. It would be strange logic to say that because the state is privileged above other plaintiffs, and cannot be barred by the statute, therefore it shall not have an equal right with other defendants to avail itself of the benefit of the statute. We think it very clear that the whole reasoning upon which this rule rests, sustains the conclusion that as a defendant, the state is entitled to this defense.

The same also may be said of the general rule, that where a statute is general, it shall not be construed as divesting or affecting any right of the king or the government, unless expressly extended to them. This is also matter of prerogative, and the object of it is to give the rights of the king, or the state, a superior privilege or protection. It therefore furnishes no reason for saying that where the words of a statute are general, that the state cannot avail itself of a right granted equally with other defendants. And the contrary conclusion is expressly recognized in those authorities which establish the rule. Thus in Bacon's Ab. Title Prerogative, E, 5, where the rule is stated, that the king is not bound by such general acts, a note is added, "but may *take advantage* of an act of parliament, though not particularly named." So in Coke, Part XI., 686, it is said, "as to the first it was objected that by the rule of the law, the king not being named in the act, is by the law exempted out of the act, for the law gives the king this prerogative, that for the dignity of his royal person, he is not, by construction of the law included with

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in these common words, "person or persons, bodies, politic or corporate," and be the statute affirmative, or be it negative, which is stronger, it shall not bind the king unless he is specially named, *but he shall take benefit of a statute though he be not named*," &c. The same principle also prevails in the rule by which the king or the state, though not liable to costs, yet receives costs. 18 John, 227. These things show that the whole extent of the rule, excepting the state from the operation of general statutes, is only so far as it is for its benefit to be excepted, and for the purpose of giving it a superior right to ordinary parties. And this certainly would go to show that where the statutes give a right to defendants, the state is not to be deprived of it.

We think, also, it was the evident intent of the legislature, in providing that the state might be sued, to submit its rights to be determined by the same law, applicable to suits between other parties, exposing it to the same legal liabilities, and entitling it to the same defenses as other parties, except as otherwise provided. The statute is short; it provides that the state may be sued, but makes no attempt to enact any special rules or laws by which its rights and liabilities are to be determined. On the contrary, it expressly refers them to the laws in general. It says the court shall proceed to hear and determine the suit, "as *the law*, and very right of the case may require." What law? Evidently the law, and all the law applicable to a legal controversy. And the statute of limitations being a part of that law, we think we must enforce its provisions in favor of the state, as well as of any other defendant. Certainly all the reasons for its application exist with more than ordinary force in such a case. The statute is based on a presumption of payment, and certainly that presumption must be stronger in case of a state than of a private individual. For experience will show that the state is generally more apt to pay claims that it ought not to, than

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not to pay those it ought to. Considerations of honor or magnanimity, can have no bearing in determining what the law is. The state has referred its rights to judicial tribunals, to be decided by the law. If by it the claim is barred, they must so declare, though it might be just and honorable for the state to pay it, if it has never been paid, notwithstanding the bar.

The statute, of course, did not run until the state rendered itself liable to a suit on any claim. But as that statute had been in force more than six years before the commencement of this suit, we think the claim is barred.

We have found no case where the precise question has arisen, and there are probably very few, if any, for the reason that the states have not usually subjected themselves to suits in their own courts. The only case we have found where a state ever pleaded the statute, was the *State vs. Vincennes United Society*, 5 Ia., 77. The suit was brought there under a special statute authorizing that particular suit, and providing that the state should plead such matters of defense "as would present the case on its merits alone;" and the court held that the statute of limitations was not such a plea, and on this ground alone, held that the state could not plead it. There is no intimation that it could not have pleaded it, if this express provision to the contrary had not existed.

We think the demurrer to the defense setting up the statute of limitations must be overruled, and that the state is entitled to judgment.

NOTE.—On a subsequent day the plaintiff asked and obtained leave to withdraw the demurrer, and file a replication to the plea of the statute of limitation.

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GRAHAM et al. *vs.* LACROSSE & MILWAUKEE RAIL ROAD COMPANY et al.

APPEAL FROM CIRCUIT COURT, MILWAUKEE COUNTY.

Heard November 9, 1859.] [Decided January 17, 1860.

Creditor's Bill—Supplemental Proceedings.

Proceedings supplemental to the execution established by the code, are a substitute for an action by creditor's bill, and constitute the only manner of obtaining the relief formerly had under a creditor's bill.

This was an action commenced by Lawrence G. Graham and Donald Scott, against the La Crosse and Milwaukee Rail Road Company, Selah Chamberlain, Moses Kneeland, Jackson Hadley, Edwin H. Goodrich, Z. G. Simmons, E. Mariner, James Luddington, Coles Bashford, Samuel Hale, Daniel Wells, jr., C. Clement, George E. Dexter, B. G. Gill, E. O'Neil, W. D. Chapin, William Chappell, E. Cram, Thomas Falvey, and E. Cramer, respondents, in the nature of a creditor's bill, setting forth two judgments for $11,170, and $29,804,57, and costs against the railroad company. The others were made parties because they were supposed to have some interest as lessors, bondholders, and receivers of money, &c. The complaint asked for a receiver, and settlement of the indebtedness of the company. All the defendants except the Railroad Company, filed demurrers and assigned reasons:

"1. The court hath no jurisdiction of the subject of the action.

"2. There is a defect of parties plaintiff. The La Crosse and Milwaukee Rail Road Company should have been made plaintiff.

"3. There is a defect of parties defendant.

"4. Several causes of action have been improperly united in this complaint.

"5. The complaint does not state facts sufficient to constitute a cause of action."

This demurrer was sustained by the circuit court, and the plaintiffs appealed.

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M. H. Carpenter, for the appellant.

After a judgment creditor has exhausted his remedy at law, he may invoke the power of a court of equity to set aside fraudulent conveyances, and to reach all trust property, all equitable interests, and choses in action, belonging to the debtor, which cannot be reached by execution at law. This power of a court of equity is not dependant upon statutory provisions, but is a part of the inherent power and original jurisdiction of a court of equity to grant relief wherever a right exists at law, and the modes of proceeding in courts of law afford incomplete remedy. This was decided, as to trust property and equitable interests, in *Hendricks vs. Robinson*, 2 J. Ch., 283; *Brinkerhoof et al. vs. Brown et al.*, 4 J. Ch., 671; *McDermutt et al. vs. Strong et al.*, 4 J. Ch., 689; *Spader vs. Davis et al.*, 5 J. Ch., 280; s. c., 20 John., 555; *Egbert vs. Pemberton et al.*, 7 J. Ch., 208.

2. The code has only changed the form in which the right is to be sought, but has not pretended to take away any *rights* which before existed. *Rogers vs. Horn*, 2 Code Rep., 79; *Hammond vs. The Hudson R. Iron and M. Co. et al.*, 20 Barb., 378.

It is true that the "*proceedings supplementary*" are, in some cases, a sufficient substitute for the creditor's action but they are cumulative upon the remedy by action, and, moreover, do not apply to corporations. *Hinds vs. Canandaigua and N. F. R. R. Co.*, 10 How. Pr., 487; *Sherwood vs. B, and N. Y. City R. R. Co.*, 12 How. Pr., 136; *Tappan vs. Evans*, 11 N. H., 311; *Bigelow vs. Cong. Soc. Middleton*, 11 Vt., 283–86; *Waterman vs. Cochran et al.*, 12 Vt., 699; *Gordon vs. Lowell*, 21 Maine, 251; *Williams vs. Hubbard*, Walker Ch., 28; *Wright vs. Petrie*, 1 S. and M. Ch., 282; *Balletine vs. Beal*, 3 Scam., 203; *Bean vs. Smith*, 2 Mason, 252; *McElwain vs. Willis*, 9 Wend., 559; Willard's Equity, p. 240.

Legislatures cannot abolish the general jurisdiction of equity. Const. of Wis., art. VII, sec. 2; *Rubens vs. Joel*, 3 Kern., 488; *Voorhies vs. Child*, 17 N. Y., 361.

3. This creditor's action is the appropriate, and often the only, remedy to enforce payment by a corporation. *Bigelow vs. Cong. Soc. Middleton*, 11 Vt., 283; *Wright vs. Petrie*, 1 S and M. Ch., 282; *Blanchard vs. Cawthern*, 4 Simmons R., 566; *Covington Drawbridge Co. vs. Shepherd et al.*, 21 How. U. S., 112.

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The better opinion is that the franchise of a corporation is not the subject of sale on execution at law, and our revised statutes, chap. 78, secs. 11–15, do not apply to railroad companies. Angel and Ames on Corporations, sec. 641, note 1; *Trustees Pres. Society vs. A. & R. R. R. Co.*, 3 Hill, 567.

In this case we steer clear of all the question ever made, for the funds we are trying to reach in the hands of Goodrich are *trust funds* within every definition. They are the funds which came to the hands of Goodrich while a director of the company; and no cases, I suppose, need be cited to show that a director is a *trustee*, &c. 1 Story Eq. sec. 465, 466, 466 a; *Chan. Corp. vs. Sullon et al.*, 2 Atk., 400–4; *Hodges vs. N. E. Screw Co.*, 1 R. I., 312–40.

But the stronghold of the defence, as I understand it, is in our revised statutes, p. 875, chap. 148, sec. 18, for the sequestration of the property and effects of insolvent corporations.

1. We say this statute vests in the circuit court a *discretionary* power only, in the nature of a *visitorial* power. In a certain case, if the creditor ask it, the court *may* sequestrate, &c.

2. The statutory remedy is cumulative only, and not exclusive of the creditor's suit. I have already shown that the creditor's suit flows from the general jurisdiction of courts of equity, and is not founded upon any statute. "If a statute give a remedy in the affirmative, (without a negative expressed or implied), for a matter which was actionable by the common law, the party may sue at the common law, as well as upon the statute; for this does not take away the common law." 2 Inst., 200; Com. Dig. Title, "Action on Statutes, C.;" *Amey vs. Harris*, 5 John., 174; *Farmers &c. vs. Coventry*, 10 John., 389; *Coldsen vs. Eldred*, 15 John., 220; *Chittenden vs. Wilson*, 5 Cow., 165; *Rex vs. Leicester*, 7 Barn. and Cres., 6.

In *Byron vs. May*, 2 Chand., 103, we find an authority nearer home, and similar to this case. *State vs. Norton*, 3 Zabriskee, N. J. 33, 40; *Mayor Bal. vs. Howard*, 6 Har. and J., 383; *Booker vs. McRoberts*, 1 Cal., 213; *Sharp vs. Warren*, 6 Price, 231; s. c., 2 Eng. Ex. Chr. R. 408; *Peoule vs. Craycraft*, 2 Cal., 243.

J. W. Carey, for the respondents.

By the Court, PAINE, J. The conclusion to which we have come upon one question presented in this case, will make it

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unnecessary for us to determine any of the others. That is, that the action known under the old system of practice as the creditor's bill, cannot now be resorted to, as such, but that the proceedings supplemental to execution, established by the code, are a substitute therefor, and constitute the only manner of obtaining the relief formerly had under a creditor's bill.

In reaching this conclusion, two questions had to be determined; *first*, did the legislature intend such a result? and *second*, if so, was it competent for them so to provide? Upon the question of intent, we think there is little room for doubt. Although it was a conceded power of a court of equity to aid a judgment creditor to reach property which the ordinary legal process could not reach, yet before the adoption of the New York statute in regard to a creditor's bill, the power was somewhat unsettled as to its extent, and the precise term and conditions upon which it might be exercised. This appears from the cases cited by the appellant's counsel. *Egberts vs. Pemberton*, 7 J. C. R., 207; *Hadden vs. Spader*, 20 John, 554; And in *McElwain vs. Willis*, 9 Wend., 559, Justice Nelson referred to the statute as having removed the doubt that might before have existed as to the extent to which the creditor must pursue his remedy at law, before he could resort to equity. The statute seems to have been evidently designed to remove whatever of uncertainty might previously have existed under the equity decisions, and to recognize expressly the existence of the power, and to prescribe definitely the conditions upon which it might be exercised. This statute was copied into the statutes of 1849, in this state, and under the old law, was usually regarded as the statute authorizing and regulating the proceedings by creditor's bill. Under this state of things the code was adopted, the professed object of which was to abolish all distinctions in the forms of proceeding between legal and equitable actions, and to establish a single, uniform

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system, under which must be sought all the relief which it was competent for judicial tribunals to provide. This system revises the whole matter of the execution of judgments, and establishes the proceedings supplemental to execution, under which all the relief may be reached that was formerly had by a creditor's bill. These facts seem to me to go far towards establishing the intent of the legislature that this particular relief should, like all other kinds of relief, be subsequently obtained only in the manner prescribed by the new system. And this conclusion is greatly strengthened by the fact that the action for a discovery, which usually constituted an important part of a creditor's bill, was expressly abolished.

We see, accordingly, that in New York, even though the old statute authorizing the creditor's bill was not expressly repealed, there are several decisions which held it to have been superceded by the provisions of the code, in respect to supplemental proceedings. In *Quick vs. Keeler*, 2 Sand. Sup. Ct. Rep., 231, the supplemental proceedings are spoken of as a substitute for the creditor's bill, and the bill was sustained in that case upon the express ground that the execution had been returned before the code took effect, and that the plaintiff was not entitled to the new remedy. The same view is taken in *Dunham vs. Nicholson*, in the same volume, 636; and in *Taylor vs. Persse* and others, 15 How. Pr. Rep., 417, the judge held that the new proceeding was "more simple, direct, and effectual in its mode of operation," than the old, and that the latter should be considered as repealed, though not expressly repealed.

It is true that in some cases the right to proceed by creditor's bill has been sustained, but it was on the express ground that the statute authorizing it was not repealed by the code, but remained in force. Such was the decision in *Catlin vs. Doughty*, 12 How., 458; but that reason would clearly im-

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ply that if the statute had been expressly repealed, the intent would have been clear that the party must resort to the new remedy. In this state that has been done. The statutes of 1849 were repealed by the revision of 1858, and at the time this suit was brought, the only law in force providing for obtaining the relief here sought, was that establishing the supplemental proceeding. Without determining, therefore, which of these two classes of decisions in New York has the better reason, where the old statute was not repealed, they both seem to show that in this state, where it was repealed, the legislature intended to make the new remedy exclusive. There would seem to be, really, no room for doubt on the question of intent.

Was it, then, competent for the legislature so to provide? This was denied by the appellant's counsel, who contended that the power to furnish the relief sought in a creditor's bill was an established part of equity jurisdiction, before the adoption of the New York statute on the subject, and consequently existed independent of the statute, and being a part of the equity jurisdiction conferred by the constitution on the courts of this state, could not be abolished by the code. We think both of these propositions may be conceded without settling the question. For it may be admitted that the power to furnish this relief was a part of the equitable jurisdiction conferred by the constitution on the courts, and that it cannot be abrogated by the legislature, but the question would still remain, whether the legislature may not regulate the manner in which it shall be furnished, at their pleasure, so long as they leave the power unabridged? And we think they may. It stands, in this respect, upon the same footing with many other distinct forms of proceeding under the old system, which have been abolished, leaving the same relief, however, attainable under the new. Thus the action of replevin was an established action at law, at the time our constitution was

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adopted, and the power to furnish the relief obtained in that action, might, perhaps, be said to have been conferred upon the courts by the grant of jurisdiction in suits at law, beyond the power of the legislature to abrogate. But it will not be contended that they may not change and regulate the mode of proceeding to obtain that relief, at pleasure. And they have done so in the code. It is now to be sought in an action for the claim and delivery of personal property. The same may be said of the bill for discovery. The relief it furnished was a part of the equity jurisdiction. The bill has been abolished, but the jurisdiction remains and furnishes the relief in another manner. And we think the same reasoning applies to the relief by the creditor's bill. The legislature may regulate the mode of obtaining it, without abolishing the power. And this is what they have done by the code. Whether the new method of proceeding is, in all respects, as convenient and desirable as the old, is not the question. Upon this there seems to be a difference of opinion in the New York decisions. But we think that all the relief that could ever be reached by the creditor's bill, may be obtained by the supplemental proceedings including the action, by the receiver therein provided for. And this being so, it was within the power of the legislature to regulate it as they have done.

We were referred to Willard's Equity Jurisprudence, p. 240, where the author considers the new remedy cumulative, and that "it does not take away the right of the creditor to resort to a court of equity for relief." He also thinks the new remedy not entirely adequate to all cases, and that "an action in the nature of a creditor's bill is still as important and necessary as it was before the code, and the principles of equity on which that bill was based, remain now, as heretofore, an essential part of remedial justice." The learned author cites no authority upon the subject, nor does he state upon what

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grounds he still maintains the right to resort to the action in the nature of a creditor's bill, independent of the proceedings supplemental to execution. It may have been upon the ground of the decision in *Catlin vs. Doughty*, that the old statute was still in force in that state. But if so, as already shown, that reason does not exist here.

So far as his remarks raise a question about depriving parties of the right to resort to a court of equity, we do not understand that there is any such question in the case. Instead of depriving the party of that power, we understand that it is expressly retained, only that in all cases where third persons claim property adversely to the judgment debtor, the action to recover it must be brought by the receiver. It seems to us that this secures the aid of the court of equity in all cases, where the prior proceedings were inadequate, and furnishes all the relief that could ever be obtained by the creditor's bill.

We think, therefore, as the law now is in this state, that this relief can be obtained only by a resort to the proceedings supplemental to execution, including the action by the receiver, where such become necessary.

Whether such proceedings will lie against a corporation, we shall not determine. It seems to have been held in New York that they would not, as it was previously held that a creditor's bill would not. But, as the question we have already decided must finally dispose of this suit, we shall not attempt to determine any others.

For the reasons given, the order of the court below is affirmed, with costs.

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HARRIS *vs.* HARRIS.

APPEAL FROM CIRCUIT COURT, WAUPACCA COUNTY.

Heard July 28, 1859.] [Decided January 17, 1860.

Pleadings—Judgment—Verdict.

A declaration in assumpsit, which averred that the defendant sold goods, &c., to the plaintiff, is so defective in substance, that no judgment can be entered upon it.

Where a declaration contains no allegations of facts, showing a cause of action, it will not be cured by verdict; the presumption being, that nothing is proved except what is alleged or necessarily implied from the allegations.

This was an action by John Harris, Jun., against John Harris, Sen., the facts of which are sufficiently stated in the opinion of the court.

George B. Smith, for the appellant.

S. Crawford, for the respondent.

By the Court, Dixon, C. J. This is an action of *assumpsit*, commenced prior to the adoption of the code, before a justice of the peace of Waupacca county. The declaration contains four counts, *namely*, for goods sold; work and labor; money had and received; and money paid, laid out, and expended. It differs, however, from the ordinary counts in assumpsit, in that the relation of the parties to the subject matter of each count is entirely reversed. The indebtedness of the defendant to the plaintiff is claimed to be for goods, &c., sold and delivered by the defendant to the plaintiff; for work and labor performed by the defendant for the plaintiff; for money had and received by the plaintiff for the defendant; and for money paid, &c., by the defendant for the plaintiff. The plea was the general issue, with several special matters of defense. The objection that no ground of action is

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set out in the declaration, was taken in the justice's court, but does not appear to have been renewed in the circuit.

The declaration is so manifestly insufficient as not to admit of comment. It is not the case of a cause of action defectively stated, which may be aided by verdict; but the plaintiff shows no cause of action at all, unless it be one in favor of the defendant, and against himself. No judgment can be sustained upon the declaration as it stands. It is well settled that nothing will be presumed to have been proved, even after verdict, except what is alleged, or necessarily implied from what is alleged; and that where the declaration contains no allegation of facts showing a cause of action, it will not be cured by verdict. *Harding vs. Crargie*, 8 Vt., 501; *Williams vs. Hingham Turnpike*, 4 Pick., 340; *Needham vs. McAnley*, 13 Vt., 68; *Carlisle vs. Weston*, 1 Met., 36; *Griffin vs. Pratt*, 3 Conn., 513; *Phelps vs. Gill*, 1 Day, 315; and *Chichester vs. Vass*, 1 Call., 83.

The judgment of the circuit court is therefore reversed, and the plaintiff may amend his declaration and have a new trial, upon payment of the costs.

WELLS et al. *vs.* MORTON.

ERROR TO CIRCUIT COURT, RACINE COUNTY.

Heard October 7, 1859.] [Decided January 24, 1860.

Clerks of Court—Judgment—Practice.

Section 27, chap. 132, authorises clerks of the court to enter up judgments in vacation, in the absence of the judge, and without his order or direction, upon filing with him proof of the existence of one of the causes for judgment therein specified: PAINE, J., dissenting.

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The cases of *Holmes vs. Lewis*, 2 Wis., 83; *Tallman vs. Tuesdell et al.*, 3 id., 443; and *Remington et al. vs. Cummings*, 5 id., 138, considered and approved.

The judgment entered in vacation, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, the act and determination of the court itself.

This was an action commenced by Julius D. Morton, against Andrew S. Wells and Otis R. Johnson, to recover the amount due upon two promissory notes made by them, for $300, and for $237 73, with interest. The complaint was in the usual form under the code, and was served, with the summons, on the defendants, August 9th, 1858. On the thirtieth of August the plaintiff's attorney filed an affidavit with the clerk of the circuit court, of no answer or demurrer; and the clerk, on the same day, entered the judgment for the amount of the notes, $590 84, and costs, $16 75. From that judgment the defendants sued out this writ of error.

Paine & Millett, for the plaintiffs in error.

Strong and Fuller, and C. H. Wakeley, for defendant in error.

By the Court, Dixon, C. J. The only question involved in this case is, whether judgments can be legally entered by the clerks of the circuit and county courts, in vacation, in the cases provided in section 27, of chapter 132, of the Revised Statutes of 1858. This section is identical with section 158 of the Code of Procedure, as originally enacted in this state, with the exception of subdivision four, which was added by the revisors. On the part of the plaintiffs in error, it is contended that by these provisions an attempt is made to transfer to the clerks a portion of the judicial power, which by section 2, of article 7, of the constitution, is vested alone in the courts therein provided for. If this be true, there can be no doubt that these provisions are unconstitutional, and that judgments entered in pursuance of them are illegal and void.

The proposition of counsel, that "the rendition of a judg-

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ment is a judicial act, which can be done by the court only," is undoubtedly correct, if by it they mean to assert that such is the theory of the law in all cases. But if they mean to affirm that no judgment can be rendered without the actual presence and direction of the court, or judge, then it is not correct. The practice of allowing clerks and prothonotaries, in vacation, and in the absence of the court, or judge, and without his order or direction, to enter and record judgments by default and confession, is of very ancient date. It had its origin soon after the substitution of written for oral pleadings, and still prevails in England. It has obtained in many of the American states. It has been the constant practice of this state, from its organization to the present time. It also prevailed in the territory, at and before the adoption of our state constitution, as will be seen by a reference to the statutes then in force. Prior to the passage of the code, it was regulated by rules of court. (See Rule 13, Old Rules.) It has frequently been recognized by this court, and never, to my knowledge, questioned, before the present time. *Holmes vs. Lewis et al.*, 2 Wis., 83; *Tallman vs. Tuesdell et al.*, 3 id., 443; *Remington vs. Cummings*, 5 id., 138.

In *Tallman vs. Tuesdell*, Mr. Justice Smith, who delivered the opinion of the court, used the following language, in reference to section 17, of chapter 89, of the Revised Statutes of 1849: "We are not aware that any authoritative construction has been given to this provision; but taken literally, it would seem to authorize the court or judge, at any time, whether in term or out, in case of default, to proceed to a final disposition of the case. The defendant having been regularly served with process, and time given him to plead answer or demur, failing to do either, or interpose any objection to the plaintiff's claim, is deemed to have admitted its correctness. The court or judge is then authorized to dispose of the case, either upon bill, or to require proof, or

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to put the complainant upon an examination. This provision only applies to cases of default. It authorizes the taking of proofs by the judge or court in term, or out of term, and a decision upon questions of fact, as well as law." This language no more clearly implies that a judgment may be entered in vacation, when there is no court in fact in session, than that of the other two cases above cited. It seems to be taken for granted, in all of them, that such judgments may be entered. We are aware that in neither was the question here made, raised or directly adjudicated. We do not refer to them as direct authorities, but as evidence of the universal acquiescence on the part of courts, as well as the bar. It is well known to every lawyer, that instances of the entering of judgments in vacation, upon confession or by default, have been very frequent, and that their validity has never been seriously doubted or questioned. Silence is sometimes said to be equivalent to a direct consent. In questions like the present, where the practice has been so constant and uniform, and where it has been so universally sanctioned by the courts, the legislature, and the profession, we cannot but regard the silence with which it has been suffered to prevail, and the want of all objections to it, as equal to direct adjudications in its favor.

The objections here made to it are purely technical. Upon such we cannot consent to disturb it. A proceeding thus recognized and established, should only be overturned for causes which reach its merits and justice. The reasons for sustaining it are numerous and weighty. The same motives of necessity which operated to introduce it originally, still exist, and in a greater degree. Our courts have quite enough to do in the management and conducting of real contraversies between parties litigant, without being troubled with the oversight and direction of matters about which there is no dispute, and upon which there is no opportunity for the ex-

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ercise of a judicial discretion. The same rule which would operate to compel the judge or court to command or direct the entry of judgment in such cases, if carried to its logical result, would likewise compel him personally to direct the whole business of the action; and we would thus be brought back to the most ancient practice, when all of the important proceedings, of process, appearance, pleadings, orders, judgment, and execution, were conducted in *open court*, and in the immediate presence of the judges and parties. Every step in an action, from first process to execution, was anciently thus taken, and is still *supposed* to be, or was so supposed, before the adoption of the code. This *supposition* prevails in the case of a judgment entered in vacation, as well as in the other proceedings in the action.

Mr. Stephen, in his work on pleading, on page 110, says: "Judgments, like the pleadings, were formerly pronounced in *open court*, and are still always supposed to be so. But by a relaxation of practice, there is now, in general, except in the case of an issue in law, no actual delivery of judgment, either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state, that by the course of practice he is entitled to a judgment, obtains the signature or allowance of the proper officer of the court, expressing, generally, that judgment is given in his favor; and this is called *signing* judgment, and stands in the place of its actual delivery by the judges themselves. And though supposed to be pronounced by the court, yet judgments are frequently signed in time of *vacation*, when the court is not sitting." And again, in speaking of the entering of the judgment on record, he says: "And when judgment is signed, not after trial, but on demurrer, or as by default, confession, &c., there having been no record yet made up, the whole proceedings, to the judgment inclusive, are to be entered for the first time on a parchment roll. This proceeding is called *entering the judgment*.

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Though supposed to be the act of the court, the duty of making the entry in proper form belongs, in fact, to the attorney of the successful party." Upon this subject, see, also, Tidd's Practice, Vol. 1, title "of Judgments by Confession," and "of Judgments by Default;" and Burrill's Practice, Vol. 1, pages 49, 50, 51, 52, and 369, *et seq.*

Upon this theory, or supposition, the objection that these provisions transfer to or vest in the clerk judicial powers, is entirely removed. The judgment, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be: the act and determination of the court itself. Such having been the well known and understood practice at the common law, when the constitution was adopted, it cannot for a moment be supposed that the framers intended by the provisions there inserted to abolish or change it. Nor do we think that it is affected by the code. The intention of the legislature to retain the substance of the old proceedings, is plain enough. To be sure, the *fiction* by which the record was made to appear as if the judgment was rendered as of the preceding term, is gone, and the proceeding now appears what it really is, and always, in fact, was, a judgment rendered in vacation, when there is no court actually in session. Though not the judgment of the court, according to its legal sense or definition, yet to hasten the progress of business, and facilitate the ends of justice, it is to be regarded by the courts as such, and may be so regarded, as well without as with the fiction or *supposition* formerly resorted to.

Judgment affirmed.

PAINE J., *dissenting*. I dissent from the opinion of the court that a judgment entered in vacation by the clerk of a circuit court, without the sanction or intervention of any judi-

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cial officer, is a legal judgment. I shall not enter into any examination of the validity of those laws existing prior to the adoption of the code, under which judgments on confession were entered in vacation. For I think their validity may be conceded, without justifying the conclusion of the majority of the court. For there is this marked distinction between those laws, and that provision of the code under which this judgment was entered, that the former required the judgment itself to be signed by a judge or commissioner having judicial power, while the latter allows the whole to be performed by the clerk, who has not, and cannot have judicial power. I concede that even under the former laws, it would be difficult, by any satisfactory reasoning to show that a judgment rendered by a judge in vacation, was really the judgment of a court. But still it would have the sanction of that officer, who, in term constitutes the court, and who may, as the constitution clearly implies, exercise a portion of the judicial power in vacation. For although section 2, Art. VII., vests the judicial power "in there courts" the specified, yet sec. 23 of the same article, provides that persons may be appointed in each county, and judicial power vested in them, "provided that such power shall not exceed that of a circuit judge at chambers." A judgment on confession, therefore, rendered under the old law, in vacation, would be the act of that officer, who may, under the constitution, exercise judicial power in vacation. And it being conceded that he may exercise a portion of that power, and the constitution not having prescribed what portion, it might well be said, that it was competent for the legislature to regulate that matter at discretion. But whether there are any limits to its power in that respect, I do not consider it material to inquire.

The former practice and long acquiescence, therefore, so strongly relied on in the opinion of the court, extend only to the support of such judgments. For the laws of the Terri-

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tory R. S., 1839, 226, sec. 2, and 228 sec. 13, expressly required judgments to be signed by a judge or court commissioner, and provided that no judgment on confession should be of any validity till so signed. And such having been the practice prior to the adoption of the constitution, when that instrument, as before shown, recognizes the fact that judicial power may be exercised in vacation by a judge or commissioner, it may well be deemed to have contemplated, at least such portion of that power as had previously been so exercised. And we accordingly find that the laws of the state were the same in this respect as those of the territory, requiring judgments in vacation to be signed by a circuit judge or court commissioner, and providing that they should be of no validity till so signed. R. S., 1849, chap. 102, § § 2 and 14. While, therefore, I am willing to concede that it is competent under the constitution for the legislature to authorize the entry of judgments in vacation, by those officers who, under that instrument, may exercise judicial power, I think the existence of such a law, and the general acquiescence in their validity furnish no support for the conclusion that the legislature may authorize such judgments by an officer who has no judicial power. And it is by reason of this distinction that I am unable to admit the conclusion of the majority of the court.

The decisions of this court referred to go no further than to sustain the judgments of judicial officers. And instead of sustaining the position that the action of such officers may be dispensed with entirely, and judgment rendered by a clerk, I think so far as they have any bearing at all on the question, they are decidedly the other way. Thus, in *Holmes vs. Lewis*, 2 Wis., 83, it was held that before the clerk could assess damages, "there must be a *judicial* determination that the charge in the declaration is true." The word "judicial" is italicised in the opinion, implying, very distinctly that the

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clerk was not competent to such a determination. And this is not left to mere implication, for the court proceeds to hold that the court could not, by rule or otherwise, depute its judicial power to a clerk, to be exercised by "rendering final judgments in vacation." And the language of the court clearly notices the distinction between the rendering of a judgment by the clerk, and the "entering up" of a judgment on confession, which, as before shown, could only be done by the sanction of a judicial officer. The entering of a judgment authorized by a judicial officer is a proper act of a clerk. The rendering of a judgment, without the intervention of any judicial officer is, in my opinion, a power with which he cannot be clothed. And this, I think, is precisely the distinction between the former and present practice.

In *Tallman vs. Truesdell*, the question was as to the power of the court of chancery to render a final judgment at special term. The power was very properly upheld, and in considering it, Justice Smith refers to another section of the statute, which, he says, "taken literally, *would seem* to authorize the court or judge, at any time, whether in term or out, in case of default, to proceed to a final disposition of the case." This language is guarded, and by no means commits the judge to the position that even a judge might under that statute have rendered a final judgment in vacation. But even if it did, the position may be conceded, as I have already attempted to show, without furnishing any sanction to a law authorizing a clerk to render a similar judgment. I think, also, that the decision of this court, as to the necessity of a judgment on confession being signed under the old practice, tends to support my conclusion. Section 2, chap. 102, R. S., 1849, which required judgments to be signed was repealed by chap. 197, Laws of 1851, and judgments on confession were afterwards quite generally entered up with-

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out being signed. But in *Remington & Perry vs. Cummings*, 5 Wis., 141, this court held that such judgments were void. It is true the decision seems to be placed on the effect of the statutes, but I am constrained to think the court, in coming to its conclusion, must have had in view the difficulty of sustaining a judgment entered in vacation by a clerk, without the intervention of any judicial officer.

The majority of the court admit that no part of the judicial power can be vested in a clerk, and they sustain the judgment in this case, upon the ground that it is not to be regarded as the judgment of the clerk but of the court. But I cannot see how this view can possibly be sustained. In the first place it does not purport to be rendered by the court, and if it did, it appears to have been rendered at a time when the court was not in session, and, therefore, not in existence for the purpose of rendering a judgment.

In *McDonald vs. Bunn*, 3 Denio, 49, the court says, "A judgment is the sentence of the law pronounced by the court. But the court can only be held in term time, and for the purpose of rendering judgments, it has no existence in vacation. Consequently a judgment cannot be rendered in vacation; and evidence, although in form that of a record, which states that a judgment was rendered in vacation, shows what could not possibly have occurred, and is, therefore, intrinsically null and void." This it states to be the law, independent of the statute of 1840, in New York, allowing judgments to be entered in vacation.

In *Hodges vs. Ward et al.*, 1 Tex., 244, it was held that a judgment rendered by a judge at chambers at a time when the court could not by law be held, was not and could not be the judgment of the court. In *Shepherd et al. vs. Wilson*, 1 Morris, Io. Rep., 448, it was held that a judgment entered at a time when the court could not by law be in session was a nulity. And this is unquestionably the general rule.

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And the only exception to it that can exist under our constitution is that which allows a judgment in vacation by a judicial officer. And I have already admitted that it is difficult to sustain even this exception by any satisfactory reasoning. For it is hard to see how it can be shown that even a judge can render a judgment of the court, at a time when the court itself could not sit and render the same judgment. But, conceding this exception to be established, and that a judgment rendered by these judicial officers in vacation may by a resort to fiction and a stretch of legal intendment be considered as the judgment of the court, yet the exception goes no further, and in my opinion rests upon too questionable a foundation to justify the extension of the fiction to new cases.

It seems to me clear that the statute under which this judgment was entered, required of the clerk an exercise of judicial power. That he not only entered, but rendered the judgment. It requires proof to be filed with him of the service of the summons, and that no answer has been received. He is therefore obliged to decide on the sufficiency of the service, and come to the judicial determination, that on the pleadings and proofs presented to him, the plaintiff is entitled to judgment. This is an exercise of judicial power. To see it more clearly, separate his action as a mere clerk from the other powers, and confer the latter on some different officer. Suppose the statute provided that the same proofs should be made to a notary public, and on his determination that there was a default and ordering judgment it should be entered by the clerk; would not this be conferring judicial power on the notary? It seems to me clearly so. And who could say that such a judgment could be considered as the judgment of the court? Yet the power may just as well be conferred on a notary, as on the clerk.

The clerk must judge whether the court has jurisdiction of the cause also. Suppose an action in some of the county

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courts with limited jurisdiction claiming an amount beyond the jurisdiction. The clerk in deciding to enter a judgment on default proved before him must pass on the question of jurisdiction. In short, it seems to me too plain to admit of argument, that in order to obtain a final judgment, there must be an exercise of judicial power somewhere. And equally clear that in this instance it is exercised by the clerk, because it is not exercised by any other officer, he being the only one who acts at all.

It is undoubtedly true that the rules of the common law which required most judicial matters to be transacted in term have been greatly changed. But it has been by statute, and at a comparatively recent period. Chitty Gen. Pr., vol. 3, chap. 3. Such has also been the case in New York. But though I have not examined with very great scrutiny, I apprehend there were no constitutional restrictions to interfere with the discretion of the legislature as to the vesting of the judicial power. Such at least is the view taken of the practice in New York, in a recent decision in Michigan. *Chandler vs. Nash*, 5 Mich., 409. The provisions of the constitution of Michigan in respect to the judicial power are substantially like ours. And it was held in that case that the legislature could not confer on a notary public power to dissolve an attachment. And the court distinguish their constitution from that of New York by remarking, that the latter contained no such limitation as to the judicial power, and refer to *Sill vs. Corning*, 15 N. Y. Rep., 300, where the majority of the court sustain a law establishing a court in a village, although such court was not among those provided for in the constitution upon the express ground that the constitution did not require the judicial power to be vested in the courts which it established. I think therefore that the question cannot be tested by the practice in New York or in England; which, even there, has been introduced by positive statute;

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but that it depends entirely on the question whether under our constitution, judicial power can be vested in a clerk; and, if not, whether the proceedings by him in entering a judgment under this act require an exercise of such power. And being of the opinion that he cannot be clothed with such power, and that he is required to exercise it in entering such a judgment, I think this provision of the statute authorizing a judgment to be entered by the clerk in vacation, without the action of any judicial officer, is invalid. And the following cases will, I think, sustain the view I have taken: *Bontor vs. Clay*, 1 Lit., 27; *Holmes et al. vs. Carr*, 1 Mo., 419; *Goddard vs. Coffeic et al.* id., 381; *Mathews vs. Moore*, 2 Murp., 181.

It is said that the objection is technical, and that it does not require the exercise of legal discrimination to enter a judgment on default, where the claim is confessed. This may be true, but to my mind it is a satisfactory answer to say that if the legislature may vest judicial power in the clerk as to those matters where the judicial action is very simple and easy, this will serve as a precedent to clothe him with those powers which are more difficult. If this judgment can be sustained, I can see no reason why the legislature may not extend the power so that the clerk may take the proofs and render the judgment in all those cases where specific relief is demanded as well as on a money claim. Indeed I see no stopping place. The objection is not so much to the evils of the practice as it is now allowed, as to the fact that it opens a passage through the provisions of the constitution, through which evils may enter.

I think within the case of *Hodges vs. Ward*, 1 Tex., 246, and *Remington vs. Cummings*, 5 Wis., 138, there was no judgment, and that the writ of error should be dismissed.

NOTE.—The Reporter, by mistake, ascribed to me the opinion in *Blaikie vs. Griswold*, *ante*, 293, which was in fact written by Justice COLE. I notice it here because, while I think there is no conflict between my conclusions in the foregoing opinion, and the points decided in that, there still is some conflict in the reasoning of the two opinions. PAINE, J.

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BEEBEE *vs.* O'BRIEN et al.

APPEAL FROM CIRCUIT COURT, GREEN COUNTY.

Heard October 20, 1859.] [Decided February 7, 1860.

Mortgage—Practice—Statutes, repeal of.

Chapter 220, Laws of 1859, which repealed the act of 1856, chapter 113, did not abate suits commenced and pending under it at the time of the repeal, nor affect them, except as to the time when the defendants were to be considered in default, and the time in which lands should be advertised for sale.

This case is to be distinguished from the repeal of a statute creating a cause of action, or remedy, or conferring jurisdiction where it did not before exist.

The act of 1858 provided only for the mode of conducting proceedings in foreclosure actions, after they had been commenced in the manner there directed; otherwise, the proceedings were all conducted under and by the code of procedure; and the repeal of the act did not affect the provisions of the code in relation to the actions pending at the time of the repeal.

This was an action commenced by Edward H. Beebee, against O'Brien, Graham and Jones, and the facts are sufficiently stated in the opinion of the court.

J. C. Hopkins, for the appellant.

E. A. West, for the respondents.

By the Court, DIXON, C. J. This is an action for the foreclosure of a mortgage, commenced in the month of November, 1858, by the service upon all the defendants of the ordinary process of summons, requiring an answer in twenty days. Two of the defendants appeared and answered on the 12th of May, 1859. The others made no appearance. At the ensuing September term of the circuit court for the county of Green, in which the action was pending, it having been duly noticed for trial, as to the defendants who had appeared and answered, the plaintiff moved for trial as to them, and

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for a judgment by default as to the remaining defendants. To both these proceedings the counsel for the defendants, who had appeared and answered, objected, for the reason that by section 4, of chapter 220, Laws of 1859, chapter 113, Laws of 1858, *commonly known as the mortgage stay law*, was repealed, without any saving clause as to foreclosure suits then pending, and that therefore no trial could be had, or judgment taken in the action. This objection was sustained by the court, and an order entered refusing to allow the plaintiff to proceed to trial or judgment; from which this appeal was taken.

If it be conceded that the act of 1858 furnished the only process by which actions for foreclosure could be commenced during its continuance as a law, it by no means follows, that its repeal, without any saving clause as to pending suits and proceedings commenced under it, would abate such suits or proceedings, or prevent the plaintiff from proceeding to a final judgment, or decree, according to the course of practice as it existed after such repeal. Under this concession, the most that can be claimed for the act is, that it was a mere regulation of the practice in that class of actions. It created no new cause of action, gave no new remedy; nor did it increase or diminish the jurisdiction of the courts. Its sole object and purpose was the modification of an existing remedy. The courts in which such actions were pending, at the time of its repeal, were courts of general and original jurisdiction, possessing the same powers and authority to hear, try, and determine them, after as before the repeal. By the service of process according to the law as it existed at the time the actions were instituted, their jurisdiction of the persons of the defendants was complete. The cause of action remained the same; and with the exception of the length of time for which the mortgaged premises were required to be advertised before sale, the nature and form

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of the subsequent proceedings continued precisely as before.

The error seems to have arisen from supposing this case to be like those where the repeal of a statute *creating a cause of action, or remedy, or conferring jurisdiction where it did not before exist*, has been holden to carry with it actions pending at the time of such repeal. That such is the effect of an absolute repeal of statutes of that character, is so abundantly established by the authorities, as not to admit of a doubt or discussion. The most familiar instances of the first class, or where the statutes give the right of action, are to be found in those cases where the unqualified repeal of a penal statute upon which a pending action was founded, has been held to extinguish the suit. In such cases, it has been held that where the statute is repealed after verdict for the penalty, but before judgment, or pending an appeal to a superior, from the judgment of an inferior court, no judgment whatever can be pronounced. The subject matter or cause of the action is gone; it is as if it had never existed. There is nothing for which the court can give judgment. The consequences of the repeal of such a statute are the same in civil as in criminal cases.

Of the second class of cases, or where the *remedy* or *action* itself is abolished, *Thayer vs. Leroy*, 11 Maine, 284, is a good illustration. It had always been held in that state, that by virtue of certain English statutes there adopted, an action of debt would lie against a jailor for an escape of a prisoner in execution. Pending such an action the legislature passed an act providing that no action should thereafter be *maintained* to recover damages for the escape of any debtor, committed on execution, except by a special action on the case. The court decided that the suit abated, and that the creditor must resort to his action on the case. The remedy by action of debt was abolished by the negative words of the statute,

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and the action on the case substituted. In that case the statute operated upon the remedy or form of the action, but in nowise affected the cause of it.

Cases of the third kind arise where the repealing act operates upon the court, and deprives it of the power to proceed, as it had the right to do under the repealed act, or where jurisdiction over particular subjects is transferred by act from one court or tribunal to another. In such cases, if there be no provision reserving to the court or tribunal before which the action or proceeding is pending, the power to proceed and determine it, it is at an end, and no farther steps can be taken. *Springfield vs. Commissioners*, &c., 6 Pick, 501, is a case of this kind. An act of 1825 conferred upon the commissioners of highways certain powers, by another statute passed in 1827, it was repealed, and the powers vested in the county commissioners. In the latter act there was no clause saving to the commissioners of highways the power to proceed and act upon the complaints and proceedings instituted and pending before them. The court decided that they had no authority to proceed in the case before them, though it was pending at the time the last act was passed.

After a patient examination of all the authorities upon this subject, within our reach, and which it is deemed unnecessary to cite here, it is believed that none can be found going beyond the principles above laid down. Some falling short of them, and sustaining broader doctrines, may be found. In *Mitchell's Lessee vs. Eyster*, 7 Ohio, 257, it was held that the repeal of a statute which *created* the remedy of foreign attachment, without any saving clause as to suits then pending, did not abate or extinguish such suits, where by the repealing act the provisions of the former statute were re-enacted.

It is very evident that the case before us does not fall within these principles; and if we were compelled to hold that the act of 1858 created or prescribed the process by

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which foreclosure actions were to be commenced, we do not see how we could then decide that the action so commenced, abated, or was extinguished by its repeal. It would then relate only to the form of the process by which the court was to obtain jurisdiction of the persons of the defendants; and after such process had been issued and served, and had thus performed its entire office, it is difficult to perceive how the repeal of the act could affect it or the jurisdiction of the court, acquired by virtue of it. It would then seem to come strictly within the rule by which it is held that every thing done under a statute while in force, remains valid, though the statute may afterwards be repealed. There could then be no valid objection to the plaintiff's proceeding to trial and judgment, particularly where, as in this case, the time for answering, as prescribed by the repealed act had fully expired.

We are not, however, willing to concede that the act of 1858, provided the process by which foreclosure actions were to be thereafter commenced. There is nothing on the face of the act which warrants such a conclusion. On the contrary, its language strongly sustains the opposite. Title 5 of the Code of Procedure, prescribed the form of the summons, and the manner in which all civil actions were to be commenced. The act of 1858 provided only for the mode of conducting proceedings in foreclosure actions *after* they had been commenced in the manner *then* directed by law. It declared that the defendants in such actions should have six months' time *after the service of the summons, or publication of notice, as then required by law*, to answer the complaint, and that no default should be entered until after the expiration of such time. The legislature could not, by language, have more unmistakably evidenced their intention not to interfere with the existing mode of commencing such actions. Such, we believe, has been almost the universal understanding and practice of the profession. The decision of this court in the case

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of *Lawrence et al. vs. Brown et al.*, made at the January term, 1859, which was referred to on the argument, does not, as we understand it, conflict with the views here taken. Unfortunately the opinion in that case has been lost. The point determined was that a summons which required the defendants to answer the complaint within *six months* after service, ought not to have been set aside for that reason. The court considered that in accordance with the spirit of our present practice, a summons which correctly apprised the defendant of what he was required by law to do, in order to make his defense, ought not, on that account, to be quashed. It was, however, at the same time, expressly held that a summons requiring an answer within *twenty days*, was valid and proper, provided the plaintiff waited the period of six months before proceeding to judgment.

It follows, from this view of the act, that the only provisions of the code repealed by the 4th section, were so much of the second and third sub-divisions of sec. 158, as authorized the plaintiff, in such action, upon proof of no answer, &c., to apply to the court for the relief demanded in the complaint, at any time after the expiration of twenty days after service of the summons, either personally or by publication. These provisions, so far as they related to foreclosure actions, were undoubtedly repealed. A further conclusion supported by this construction, is that the repeal of the act of 1858, by the act of 1859, in no way affected pending suits, except as to the time when the defendants were to be considered in default, or when plaintiffs were permitted to apply for judgment. All the other provisions of the former act were supplied by the latter. This is a question, however, not properly to be discussed here, as we are clearly of opinion that the plaintiff was at liberty to proceed to judgment for want of an answer after the time fixed for answering by the repealed act had elapsed.

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The order of the circuit court must be reversed, and the cause remanded for further proceedings, according to this opinion.

CORNELL *vs.* SKINNER et al.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard October 20, 1859.] [Decided February 7, 1860.

Mortgage—Practice—Statutes Repeal of.

Where a party had commenced a foreclosure of a mortgage under a statute which required the defendant to answer in six months, and before that time expired, and after the defendants had entered their appearance in the cause, the statute was repealed, thus leaving no statute or rule of court prescribing the time in which the answer should be put in; such repeal does not abate the suit, but the plaintiff may serve a notice on the defendants to show cause, and on their neglect to answer, or show cause, judgment will be entered by the court as for a default.

This was an action commenced by Latham Cornell against Russell Skinner, Alice E. Skinner, Otis E. Stevens, Mary A. Stevens, Edwin Skinner, Henry Skinner, Richard Van Alstine, Charles D. Wicker, Joel H. Wicker, Columbus A. Orvis, William H. Dewey, David Rhodes, Alex. McClurg, James D. Vanhovenburg, Nicholas Schneider, Benjamin Raymond, Charles P. Raymond, John G. Conroe, Hugh Gorton, Phillip Lovell, John Kimber, Charles Fountain, John C. Tucker, Thomas Smith, jr., Charles L. Curtis, and John Heley, to foreclose a mortgage, as stated in the opinion of the court. In addition to the facts therein stated, it is only necessary to add that at the commencement of the suit, the defendants had, by law, six moths in which to answer the complaint. But that act was repealed by chapter 220, General Laws 1859, published April 2d, 1859, in express words, thus leaving no time in which the defendants were to answer.

Wakeley and Tenney, for the appellant.

Paine and Millett, for the respondents.

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By the Court, DIXON, C. J. This is an action for the foreclosure of a mortgage. The summons and complaint, in the usual form, were served on the 15th of November, 1858. On the 8th of December following, the defendants, by their attorneys, Spooner and Dale, entered their appearance. On the 28th of April, 1859, the plaintiff, after due notice to the attorneys of the defendants, applied to the court for judgment. This application, which was resisted by the defendants' attorneys, was granted by the court, and judgment in the usual form, rendered for the plaintiff. On the 28th of the following May, the circuit court, upon the motion of the defendants, vacated the judgment. The reasons assigned for vacating it were "that the time to answer given the defendant by statute, had not expired when the judgment was entered, and that the action was abated by virtue of chapter 220, of the General Laws of 1859." From the order vacating the judgment, the plaintiff took this appeal.

It will be seen at a glance that the only substantial point of difference between this case and that of *Beebe vs. O'Brien et al., supra*, 481, already decided, is that in this case the application for judgment was made *before* the expiration of the six months time to answer given by the repealed act of 1858, while in that it was made *after*. The *forms* in which the questions are raised differ. There the appeal was from an order refusing to allow judgment to be entered. Here it is from an order vacating a judgment already rendered. The grounds of both orders are the same, with the exception above stated. The points discussed in that case need not be noticed here further than to say that under the principles there held, the suit did not abate. The controversy is, therefore, reduced to the single question, whether a judgment, rendered against defendants who have been regularly served with process and duly notified of the plaintiff's intended application therefor, ought to be set aside or vacated because

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there was no provision of statute, or rule of law or court, prescribing the time within which they were to answer, or when the plaintiff should be at liberty to proceed against them as by default.

The act of 1858 having repealed so much of sec. 158, of the code as authorized an application for judgment in foreclosure actions, after the expiration of twenty days from the time of service, in case no answer was put in, and substituted in place thereof the period of six moths, and the act of 1859 having absolutely repealed that of 1858, without any substituted provisions as to the time to answer in pending actions, left the suit in this very singular and anomolous position. There was no rule of law or practice prescribing when the defendant should put in his answer, or when the plaintiff might proceed to judgment for want of it. It is vain to consult the books for authorities on such a question, for never, since the proceedings of courts of law or equity have been handed down to us by means of written or printed reports, has there to our knowledge been a time when there was not, by some provision of statute or rule of court, a *day certain* given, before which the defendant was permitted to answer, and after which the plaintiff might not proceed for want of it.

This is one of the many questions which have been brought before this court growing out of the enactment, repeal, and subsequent partial re-enactment of our so-called mortgage stay law, and results from an unpardonably hasty and inconsiderate course of legislation. The evils of such legislation have been often felt and frequently commented upon. "No attention," says Mr. Sedgwick in his treatise, "can be paid to our statutory laws without observing the mischiefs resulting from ill considered legislation, violent and sweeping innovation, or the hasty repeal of previous enactments. The inconveniences consequent upon retroactive statutes are often of the most serious character, and cannot be

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too frequently pointed out, nor too often insisted on." Perhaps some consolation ought to be drawn from the fact that these are evils of no modern date, and that they are not confined to our state or country. "The mischiefs," says Sir William Blackstone, in his lecture on the study of the law, "that have arisen to the public form inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy of attention." "For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament—'over laden,' (as Sir Edward Coke expresses it,) 'with provisos and additions, and, many times, on a sudden penned or concocted by men of none or very little judgment in the law.'"

Although that learned commentator was an ardent devotee to the common law, yet the remarks may not be altogether unworthy of attention in our own times. The mischiefs still exist to an equal, if not a greater extent, both in this country and England. The Lord Chief Justice, in debate in the House of Lords in 1850, said that "the real evil under the present system was that nine-tenths of the time of the judges was taken up in endeavoring to reduce to intelligibility the ill digested legislation of their Lordships' House." It is certainly better that some evils of past legislation should be endured, than that we should, by sweeping innovations and hasty repeals, be kept constantly in doubt as to what the law really is.

In *Beebee vs. O'Brien, Supra*, 481, we decided that the plaintiff, without notice to the defendants, who had not appeared, might proceed to judgment at the expiration of six months after the service of process. The question here is,

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whether he could do so before the six months had expired, upon giving notice of his intention so to do to the defendants, all of whom had appeared in the action. It was contended on the argument, that as there was no rule of law fixing the time within which the defendants must answer or be in default, and as the court had acquired jurisdiction of their persons by the service of the summons, the plaintiff was at liberty, without notice to them, at any time when the court was in session for the transaction of such business, to apply for and obtain his judgment. In other words, it was said that the defendants, if they desired, were bound to answer at once, or at least that they must take notice of the sessions of the court and be before it, either personally or by attorney, and when the application was made, make known their intention to answer, and contest the plaintiff's claim on the merits, and obtain leave for that purpose. We do not think this doctrine can, or ought to be sanctioned. It has been so long the practice to give to a defendant his *day certain* in which to plead, and so careful has the law always been to guard against surprise in such matters, that we think it would be a violation of well settled and sound principle. A plaintiff intending to take judgment before the expiration of the time to answer fixed by the repealed act, should at least be required to give notice of such intention.

In this case, however, notice was given, and the defendants appeared and resisted the application. The case does not show upon what grounds such resistance was made, but the inference is that they were the same as those subsequently urged upon the motion to vacate. At all events, it does not appear that they offered to answer or contest the plaintiff's demand on the merits. If they had done so, or satisfied the court that they had any good defence, it would have been proper to have refused the application and allowed them to answer. Not having done this, judgment was pronounced against them. Was

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this judgment so irregular as to warrant its being vacated for the reasons stated in the motion? We think not. It violated no rule of law or practice, and by it exact justice was administered between the parties.

The order of the circuit court is reversed, with costs.

PAINE, J. dissented from the decision in this case, but wrote no opinion.

WIGGINS *vs.* SILVERTHORN.

APPEAL FROM CIRCUIT COURT, ROCK COUNTY.

Heard October 20, 1859.] [Decided February 7, 1860.

Frauds—Practice—Motions.

W. had a contract for the sale of real estate, and paid considerable of the purchase money, when the vendor sold the land to S., W. then obtained a decree for specific performance, afterwards a judgment creditor of the vendor levied an execution upon the same land, and sold it, becoming a purchaser, and then assigned to S.; but the execution, sale and assignment were intended to defraud W. out of his purchase money: Held, that such a sale would be set aside upon the motion of W. as being in fraud of his rights.

This was a motion made by Alexander C. Wiggins, the respondent here, in the circuit court for an order setting aside and vacating a sale of real estate made by the sheriff of Rock county, by virtue of an execution issued out of the circuit court for Rock county, upon a judgment recovered by E. P. Doty against Spencer Snyder. The motion was based upon petition and affidavits; copies of which, with notice of the motion, was served personally upon the appellants.

On the 22d day of November, 1853, Snyder was the owner of two pieces of land, in the county of Rock; one being the N. ½ of S. E. ¼ of sec. 28, T. 3, R. 11, 80 acres; the other, S.W. ¼ of N.E. ¼ of N.W. ¼ of sec. 36, T. 3, R. 10. These pieces

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of land do not adjoin each other, and do not constitute one piece or tract. January 25th, 1853, Doty recovered judgment before a justice of the peace against Snyder for $62 89 damages and costs; and on the 27th day of January, 1853, caused a transcript to be filed in the office of the clerk of the circuit court, so that it became a lien upon this land owned by Snyder.

November 22d, 1853, Snyder entered into a contract with Wiggins to convey to him the N. ½ of S. E. ¼ of sec. 28. Wiggins paid two hundred dollars of the purchase money; Snyder continuing to occupy the premises, under the terms of the agreement. On the 16th day of March, 1854, Snyder and his wife conveyed the two tracts of land to Lewis T. Silverthorn; they conspiring together to cheat Wiggins out of the $200, and to prevent him from obtaining a specific performance of the contract, Silverthorn being cognizant of the agreement with Wiggins. June 24th, 1854, Wiggins filed his bill against Snyder and Silverthorn and Mrs. Snyder, to compel specific performance, and obtained a decree in November, 1859. July, 1853, Doty sued out execution on his judgement, before the justice, and on it made $27 05 out of Snyder's personal property. This execution was returned September 15th, 1853. May 5th, 1854, Doty caused an execution to be issued out of the circuit court on his judgment to collect the full amount; not having then filed any evidence of an execution having been issued before the justice. That execution was delivered to the sheriff of the county of Rock, who, by virtue of it, levied upon both these tracts of land; and, June 22d, 1854, sold both tracts for the gross sum of $83 65, being the full amount of the judgment, interest and costs, and expenses of sale; and E. P. Doty was the purchaser. Doty subsequently assigned the certificate of sale to Finley Silverthorn. The petition states that Doty, when applied to by the attorney of Wiggins to redeem, stated that John R. Bennett, who was the solicitor for Silverthorn and Snyder in the suit of Wiggins against them, had redeemed the land from the sale; that John R. Bennett did negotiate with Doty for the certificate, but instead of redeeming, took an assignment to Finley Silverthorn; and states upon belief that Finley paid no consideration for the assignment, and that he took and holds the assignment for the benefit of Lewis or Snyder, and the assignment was taken for the sole purpose of defrauding Wiggins of his interest in the land under his contract with Snyder.

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At the time of making the contract for the sale of the eighty acres between Wiggins and Snyder, there was a mortgage upon the two pieces of land, executed by Snyder and wife, to Smith Halstead, dated July 21, 1851. A decree of foreclosure and sale under that mortgage was obtained on the 5th December, 1854, and the mortgaged premises were advertised to be sold on 30th day of March, 1857. Wiggins offered to pay the amount of the decree and costs to the complainant in the case, and demanded an assignment of the decree. That was refused, and he paid the amount of the decree, interest and cost, amounting to $564 65, to the solicitors for the complaint, in order to protect his interest in the eighty acre tract under said contract.

The motion was made, and an order vacating the sale entered on the 25th day of January, 1859. From this order the two Silverthorns appeal to this court.

J. A. Sleeper, for the respondent.

By the Court, PAINE, J. The appellants in this case have furnished no brief, and given no information as to the grounds relied on for reversing the order. Under these circumstances, we have neither the time nor the inclination, to examine a long case very critically, to see what questions might be made upon it. But upon looking through it, assisted by the brief of the respondent's counsel as to the questions made, we have seen no reason for reversing the order.

There is much in the evidence going to show a fraudulent collusion, for the purpose of depriving the respondent of the benefit of his contract for the purchase of the land, and that the assignment of the certificate of sale to Finley Silverthorn was in pursuance of this design. It also appears that Wiggins attempted to redeem from the sale on Doty's execution, and would have done so, but was informed that Silverthorn had redeemed, by which he understood that it was Lewis F. Silverthorn, with whom he was already in litigation with respect to it. This was such a mistake of fact as would perhaps be a sufficient ground for equitable relief. And taken

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in connection with the strong probability that the assignment of the certificate to Finley Silverthorn was really for the benefit of Lewis F., we think it justifies the order appealed from.

The order is affirmed with costs.

HOWLAND *vs.* NEEDHAM.

APPEAL FROM CIRCUIT COURT, RACINE COUNTY.

Heard November 23, 1859.] [Decided January 7, 1860.

Execution—Ejectment—Imprisonment for Debt.

An execution can issue against the body of the defendant upon a judgment for damages for withholding real property, and the rents and profits, where pursuant section 73 of the code, a claim for such damages was united in the complaint in the action for the recovery thereof.

The action of ejectment is an action *ex delicto*, and the 16th section of Article I. of the constitution, providing that "no person shall be imprisoned for debt arising out of, or founded upon contract," does not apply to the judgment rendered in such action, but the plaintiff is entitled to have a *ca. sa.*, to enforce his judgment against the defendant.

Though the legislature may change the *form* of the action, they cannot change the *essence*. They may make but *one form* of action, but they cannot change torts into contracts, nor contracts into torts.

This was an action commenced by Richmond W. Howland against William L. Needham, for false imprisonment. The complaint was in the usual form, and avered an imprisonment for four days in the common jail. The answer of the defendant after the general denial, stated that he had caused an execution to issue out of the circuit court of Racine county, on a judgment in his favor against the plaintiff and one Moses Adams, on which the sheriff arrested and imprisoned the plaintiff, where he remained for two minutes.

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The execution was issued upon a judgment recovered against the plaintiff and Adams for $593, in an action of ejectment; and the plaintiff had been taken in custody for the want of goods, &c., and he had committed him as he had a right to do. On the trial before the court and jury, the plaintiff recovered judgment for $400. The evidence showed the imprisonment upon the execution, as stated in the plea, for half an hour; when the plaintiff was discharged upon a *habeas corpus*. The circuit judge charged the jury that "the judgments and executions which had been given in evidence, did not authorize the imprisonment of the plaintiff, and that they constituted no justification to the defendant, and were no defense in this action and that an execution against the body, was not authorized by said judgment.

"That if the jury believed, from the evidence, that the plaintiff did not cause the defendant to be imprisoned wickedly, wilfully, and maliciously on said judgment and execution, or with a wilful and malicious intent to injure him, you are at liberty not only to give the plaintiff the damages he actually sustained in consequence of the imprisonment, but you may give him such exemplary damages as you may think just and proper considering all the circumstances and the wealth of the defendant.

"If, on the contrary, you believe that the imprisonment was caused by the defendant honestly believing that the judgment and execution legally and properly authorized the imprisonment in the course of collecting his judgment, and believed that the course he pursued was the proper and only course to collect his judgment, and that he was actuated purely by a desire to collect his judgment, and not actuated by a desire or intention unnecessarily to injure the plaintiff, then plaintiff is not entitled to recover smart money or vindictive damages, but he is entitled to recover the damages which he sustained in consequence of the imprisonment, and necessarily growing out of the imprisonment; and such damages are to be found by you from all the facts in the case, which have been given in evidence upon the trial. The cost and expense of getting discharged from imprisonment, services of counsel and attorney, and all other expenses incurred by him in getting discharged from jail, are proper subjects for you to consider. The injury to the plaintiff's feelings, injury to his reputation, his actual suffering in body and mind are actual damages, and are all proper for

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you to consider and take into account in estimating the actual damage which he suffered, and a suitable compensation for such injury, pain, suffering, and loss of reputation should be allowed by you as actual damage, in addition to what you may think proper to allow for the loss of time, expense, and cost to which he was subjected by said imprisonment.

From that judgment the defendant Needham appealed to this court.

John W. Cary, for the appellant, relied on the State Constitution, Art. I., § 16; Code, § 198; 3 Black Com., 117; 1 Chitty Pl., 97, 98, 125, 187; R. S., 1849, 566, § 30, 31; Graham's Pr., 836–7; *Pomeroy vs. Crocker*, 2 Wis., 112.

Paine & Millett, for the respondent.

By the Court, Dixon, C. J. The record in this case presents one question which is decisive of the action. It is whether an execution can issue against the body of a defendant upon a judgment for damages for the withholding of real property, and the rents and profits, where, pursuant to section 83, of the Code of Procedure, a claim for such damage was united in the complaint in an action for the recovery of such property. To determine it we have only to ascertain whether the damages recovered arose out of, or were founded upon a contract expressed or implied.

The sixteenth section of the first Article of the Constitution, provides that no person shall be imprisoned for debt arising out of, or founded on such contract. In other cases the judgment debtor may be imprisoned under such regulations as are prescribed by statute. That *ejectment* was an action *ex delicto*, is clearly indicated by its name of "action of *trespass* in ejectment," 3 Black. Com., 199. It is also clear that the wrongful receipt by the tenant in possession of the *mesne* profits, or the withholding of the possession from the lawful owner has always been regarded as a *tort*, for which, by the common law, an action of *trespass* might be maintained. In

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treating of the action of ejectment, Blackstone, vol. 3, p. 205, says: "The damages recovered in these actions, though formerly their only intent, are now usually, since the title has been considered the principal question, very small and inadequate; amounting, commonly, to one shilling, or some other trivial sum. In order, therefore, to complete the remedy, when the possession has been long detained from him, that had the right to it, *an action of trespass also lies*, after a recovery in ejectment to recover the *mesne* profits which the tenant in possession has wrongfully received." The unlawful detention of the possession is considered in the law as *a wrong*, and as such redressed. We do not see how it can be otherwise regarded. The record of the action of ejectment, in which the judgment for damages in this case was rendered, appears wholly unconnected with any contract. The fact that the remedy by action of trespass has never obtained in this state, in no way affects or changes the *nature* of the injury complained of. The suggestion on the roll provided by the statutes of 1849, was substantially the same thing. So in the claim for damages which the plaintiff is now permitted to unite with his claim of title, and for possession. Both are substitutes for the action of trespass. The legislature may change the *form* of the action, but its *essence* is beyond their reach. They can declare that there shall be but *one form of action*, but they cannot thereby convert torts into contracts, or contracts into torts. The principles upon which they are distinguished, are above legislative influence. The exemption from imprisonment extending no farther than to cases of debt arising out of contract express or implied, the plaintiff was liable to the arrest complained of.

Judgment reversed.

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WARREN *vs.* GORDON et al.

APPEAL FROM COUNTY COURT, MILWAUKEE COUNTY.

Heard July 1, 1859.] [Decided February 7, 1860.

Judgment—Practice—Summons.

In an action upon a penal bond, the summons and judgment should be for the amount of the penalty; but the execution can only issue for the amount actually due.

In an action upon such bond, the summons was for *relief*, and the complaint, a copy of which was served therewith, demanded the appropriate judgment for the penalty, and judgment by default was entered for the damages assessed, which were less than the penalty: *Held*, that such judgment would not be reversed on appeal, the irregularities complained of affecting no substantial right, were cured by statute.

This was an action brought by Dewey K. Warren, Sheriff of Waukesha, against Lefebre D. Gordon, Orvis French, and D. Edgar French, upon an indemnity bond, given by the defendants to the plaintiff, to secure him in making a levy in an attachment case, of Gordon against one Peter Smith. The penalty in the bond was $800. The goods taken were appraised at $433, and taken from the possession of one Franz Hœnig, who subsequently recovered a judgment against the plaintiff, in replevin, which the plaintiff had been obliged to pay. The complaint, which was served, claimed for the judgment and costs, attorney's fees, witness' fees, and for labor in defending the replevin suit, amounting to $800. The judgment was for $650 54, and costs, $37 65. The other facts appear by the opinion of the court.

Downer & Ladue, for the respondent.

J. H. Paine & Son, for the appellants.

By the Court, Dixon, C. J. This is an action upon an indemnity bond, executed by the appellants to the respond-

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ent, as sheriff of Waukesha county. It was instituted in the county court of Milwaukee county, on the 21st day of January, 1859. The complaint is in the usual form, avering breaches, and demanding judgment for $800, the penalty of the bond, besides costs of action. The summons is for *relief*. The defendants having failed to answer, the plaintiff, at the ensuing February term, took judgment by default, for $650 54, being the amount of damages assessed for the breaches assigned in the complaint, and the costs of the action. From this judgment the defendants appealed to this court, and ask that it be reversed, because the complaint states a cause of action arising on contract for the recovery of money only, and demands the appropriate judgment; and the summons should therefore have been in the form prescribed by the first part of section 3, chapter 124, of the Revised Statutes, and have notified the defendants, that the plaintiff would take judgment for the penal sum named in the bond.

There can be no doubt that the summons was irregular. The action was upon a contract for the recovery of money only. The judgment is also irregular, in not having been taken for the penalty. Section nineteen, of chapter 140, of the Revised Statutes, provides that in all actions brought for the breach of the conditions of a bond, judgment shall be entered in the common form, for the penal sum, but no execution shall issue thereon, except as provided in the following sections. The subsequent sections provide for the assessment of the amount actually due, and the issuing of execution therefor. However, as neither of these irregularities affect the substantial rights of the appellants, the judgment of the county court must be affirmed. Sec. 40, chap. 125, R. S.

Judgment affirmed.

PAINE, J., tried this cause below, and did not participate in the hearing on appeal.

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HAFERN *vs.* DAVIS.

ERROR TO CIRCUIT COURT, DODGE COUNTY.

Heard November 11, 1859.] [Decided February 7, 1860.

Guardian—Next Friend—Summons—Publication.

A judgment entered after verdict will not be reversed for an error committed in the appointment of a next friend to prosecute the action.

Where a party seeks to bring a defendant into court upon publication of summons under the code, he must strictly comply with the requirements of the statute, and unless this be done, the judgment will be reversed for want of jurisdiction of the person of the defendant.

Statements on information and belief merely, that the defendant's residence cannot be ascertained, or that his whereabouts cannot be discovered, are not sufficient evidence of non-residence in the state to authorise an order of publication of the summons. Such statements are but hearsay, and do not amount to legal proof.

This was an action commenced by Sally Ann Davis, 17 years of age, by her father Harry Davis, against Martin Hafern, for damages for breach of promise of marriage. The petition of the plaintiff is signed by herself and sworn to, and the father consented to serve, and the order appointing him is signed by the circuit judge. The summons, being in the usual form, was returned by the sheriff, that by diligent search he could not find the defendant in the county. The attorney for the plaintiff then made an application for an order of publication of the summons, to a court commissioner of the county, which was granted to him. The affidavit on which that order was based, was as follows: "Horrace D. Patch, of Beaver Dam, in said county, being duly sworn, says he is the attorney for the above named plaintiff, that a cause of action exists against defendant, that said action is brought against said defendant for breach of promise of marriage, that a summons has been issued in said action; that upon information and belief said defendant has absconded and left the state of Wisconsin; deponent has made diligent inquiry of the neighbors of said defendant, where he resided before leaving this state, and is unable after such inquiry to ascertain the residence of the defendant, or where he may be found: deponent has been informed that

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said defendant has been in Kansas since he left this state, but cannot ascertain where he now is, but believes he keeps himself out of this state to prevent being served or arrested on process.

The defendant did not appear, and the case was tried by the court without a jury, who found for the plaintiff, and entered judgment for $500 and costs. From that judgment the defendant sued out this writ of error, and assigned for error: 1st, there was no next friend appointed for the infant plaintiff, as required by statute. 2d, The court acquired no jurisdiction over the person of the defendant. The affidavit for, and order of publication of summons, are insufficient to bring the defendant within any of the cases provided for by the code.

Smith and Ordway, for the plaintiff in error.

H. D. Patch, and Smith, Keyes and Gay, for defendant in error.

By the Court, Dixon, C. J. The judgment in this case cannot be reversed for any irregularity in the appointment of the next friend of the defendant in error. By our statute of jeofails, as it existed prior to the repeal of the statutes of 1849, such defect was cured by verdict or judgment in favor of the infant. Sub. 7, sec. 7, chap. 100, Revised Statutes of 1849. Our present statute is much more broad and liberal. All objections not going to the merits of the action or defence, seem to be swept out of existence. Section 40, of chapter 125, provides: "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or defect." This is evidently an error or defect which does not affect the substantial rights of the plaintiff in error.

The affidavit on which the order for publishing the summons was made is clearly defective, and by it no jurisdiction

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was conferred either on the commissioner or court. It is a well settled rule that in all such special proceedings, by which the rights of absent or non-resident defendants are to be affected or bound, the requirements of the statute must be strictly complied with. This affidavit does not state a case falling within either subdivision of section 40 of the code. It is so totally defective that it is difficult to say under which subdivision the pleader intended to proceed. It comes, perhaps, nearer to making a case under subdivision two than any other, and such may have been the intention. If so, it is defective in not stating that the defendant, (plaintiff in error) was a resident of this state, or that he departed therefrom with intent to defraud his creditors or avoid the service of a summons. It might, it is true, be inferred from the statements that he "has absconded and left the state of Wisconsin," and "deponent has made diligent inquiry of the neighbors of said defendant, where he resided before leaving the state," that he was or had at some time been a resident, if it was not afterwards stated that the deponent was "unable, after such inquiry, to ascertain his residence." If it be permissible to state such facts inferentialy, the inference to be drawn from the two first statements, is neutralized by the last. If he ever resided in this state, the particulars of such residence, as to time and place, are not shown, nor does it appear when, or with what intention, he departed. The statute plainly refers to the defendant's place of residence at the time the proceedings are taken. The allegation that the deponent "cannot ascertain where he is, but believes he keeps himself out of this state to prevent being served or arrested on process," is no evidence to show with what intent he departed. He might have left from very proper motives, and yet this charge be true. It is the intent with which he departed, and not that with which he keeps out of the state, that constitutes the basis of the proceeding under this subdivision.

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If intended as a proceeding under the third subdivision, then the affidavit is not good. It does not state that the defendant was a non-resident, nor that he had property within this state.

The affidavit is in other respects irregular. Most of the statements are made upon *information* and *belief*. Such statements are but hearsay, and not evidence of facts. They are excluded by the familiar rule of law which requires the best evidence of which the nature of the case will permit. We do not wish to be understood as deciding that in no case can such statements be received. Under certain circumstances, and in connection with other facts clearly proved, they, perhaps, may be. But where the facts are such as can be established by direct and positive testimony, they should be. Such was the fact of residence in this state; yet all that is said upon this subject is upon information and belief merely. It is a general rule that witnesses must speak of facts and circumstances within their own knowledge. If information is received, it should be as to such matters as cannot otherwise be shown. The names of the informants should be stated, so that the officer may judge of their credibility and means of knowledge, and a satisfactory reason shown for not calling them, as that they are members of the defendant's family, or adversely interested. 6 Hill, 187. None of these things were done in this case.

There having been no legal evidence before the commissioner tending to prove many of the material facts to be established, no such *prima facie* case was made out as to give him jurisdiction, and make his decision conclusive.

The judgment of the circuit court must, therefore, be reversed.

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DUNBAR *vs.* HOLLINSHEAD.

APPEAL FROM CIRCUIT COURT, DODGE COUNTY.

Heard July 16, 1859.] [Decided February 7, 1860.

Bill of Exceptions—New Trial—Error—Appeal—Orders.

No bill of exceptions is necessary to enable this court to review proceedings upon an appeal from an order.

Exceptions are only necessary when the appeal is from a final judgment, and a review of an intermediate order is sought.

A writ of error at common law only lay for matters apparent on the record. Hence, exceptions were introduced, and their office is to place on the record alleged errors which could not otherwise appear.

Sections 16 and 20, of chap. 132, R. S., relating to exceptions, apply to appeals from final judgments, and not to cases where a party desires to exercise the right of appeal for the purpose of reviewing the decision upon a motion not in the nature of a final judgment. And section 5, chap. 139, is consistent with this rule.

A motion for a new trial cannot be made upon the minutes of the judge taken on the trial at a previous term of the court, under section 16, chap. 132, R. S., such motion is restricted to the term at which the trial took place.

A party seeking a new trial on the ground of newly discovered evidence, must produce the affidavits of the witnesses themselves, or satisfactorily show why he cannot do so.

This was an action of replevin, commenced by Hezekiah Dunbar against James W. Hollinshead, for a steer, in which verdict and judgment were given for the plaintiff. At the next term of the court the defendant made this motion for a new trial, founded on the affidavit of the defendant, and on the minutes of the judge taken at the trial, of the evidence of five witnesses. The motion was granted, and the plaintiff appealed. The other facts may be gathered from the opinion of the court.

Smith & Ordway, for the appellants.

Francis Hamilton, for the respondent.

By the Court, Dixon, C. J. This is an appeal from an order of the circuit court, granting a new trial. In it there is

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presented a preliminary question of practice. It is whether in cases where an appeal to this court is given from an order of the circuit court, an *exception* to such order is necessary, for the purpose of enabling this court to review it. The practice of making and settling a bill of exceptions in such cases, has, to a considerable extent, prevailed; but the question here raised has not, as we are aware, been directly passed upon by this court. The decisions of this court, which most nearly relate to this question, are to be found in those cases where it has been held that on appeal from a *final judgment*, no intermediate decision of the circuit court upon a motion can be reviewed, unless such decision was excepted to and incorporated in the bill of exceptions. This has been determined since the adoption of the code in the cases of *Williams vs. Provost*, 7 Wis., 165, and *Sayre vs. Langton*, id., 214. It was so determined before the code was adopted, in the case of *Cavanaugh vs. Titus*, 5 Wis., 143. Such has always been the practice in this state. These were all cases of appeals from final judgments. Although *Williams vs. Provost*, and *Cavanaugh vs. Titus*, were brought here from the decisions of the circuit courts upon a motion to dismiss appeals taken from judgments of justices of the peace, yet in the latter case it was expressly said that such decisions were in the nature of final judgments, and as such would sustain and could be reviewed upon a writ of error; we, therefore, propose here briefly to examine the question upon what appears to be its merits.

At common law a writ of error lay for an error apparent in the record, or for an error in fact, where either party died before judgment. It did not lay for an error in law not appearing in the record, and hence where the plaintiff or defendant alleged any thing *ore tenis*, which was overruled by the judge, this could not be assigned. It was not an error appearing upon the record, nor an error in fact, but in law,

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and the party aggrieved by it was without a remedy. Bacon's Abr. Title, "Bill of Exceptions," vol. 1, 788. To obviate this evil the statute of Westminister, 13 Ed. I., was passed, authorizing the parties to allege exceptions, and requiring the justices to allow and put their seals to them when they became a part of the roll. The practice of allowing exceptions had its origin under that statute of which all subsequent statutes have been substantially copies. Our own statute, of 1849, section 12, of chap. 104, revived, and now in force by chap. 61, Laws of 1858, as to all cases tried by jury is very nearly the same thing. Exceptions were introduced to place upon the record alleged errors which could not otherwise appear, and such has ever been their office. In no other case are they necessary. *Mackie's Heirs vs. Thomas*, 7 Wheat., 532; *Button vs. Gibbon*, 7 Halstead, 76.

In this last case it was said that "a bill of exceptions taken on the argument and decision of a demurrer was a novelty in practice, and wholly unauthorized." The same remark would be true when applied to a demurrer under our present sytem of proceedings and practice. The whole matter appearing already of record, no exception would be necessary. It would add nothing to the record which would not appear without it. It seems to us that the same is true in the case of an appeal from an order, and that in the absence of a statute requiring it, this court cannot do so.

The only provisions for exceptions other than those above referred to, are contained in section 16, and 20 of chapter 132 of our present Revised Statutes. Both these sections plainly relate to exceptions taken and settled for the purpose of an appeal from a final judgment, in cases where there has been a trial of questions of fact by the court or a jury, and not to cases where a party desires to exercise the right of appeal for the purpose of reviewing the decision of the court upon a motion where such decision is not in the nature of a final

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judgment. It is also very evident, from the return which is required to be made to appeals in such cases, that no bill of exceptions is contemplated. It is provided, in section 5 of chap. 139, that "on an appeal allowed from an order by this chapter to the supreme court, the clerk, with whom the notice of appeal is filed, and the order entered, shall forthwith transmit to the supreme court a certified copy of the order, the notice of appeal, and the papers upon which the appeal 'order' was granted." This is the only return prescribed by law, and the one here made being regular in this respect, we cannot refuse to act upon it.

The order granting a new trial must be reversed. So far as it was made on the minutes of the judge taken upon the trial, had at a previous term of the court, it was irregular and unauthorized. Section 174 of the code, of which section 16 of chap. 132 is a copy, provided that in actions thereafter tried, such motions could only be heard at the same term or circuit at which the trial took place. If made afterwards, they must be upon a case, or exceptions made and settled.

The affidavit of newly discovered evidence, is clearly insufficient. The party seeking a new trial on this ground, must give the court the best evidence possible of the truth of the allegations. In order to do this, he must produce the affidavits of the witnesses themselves, or satisfactorily show why he cannot do so. In this case no reason or excuse, whatever, for their non-production, is offered. The strict observance of this rule is indispensible, in order to guard against unfounded applications. The respondent in his affidavit says that he has disclosed to his counsel the facts which he *expects* to prove by the newly discovered witnesses, and that they will testify to such and such things. This is, at best, but mere hearsay. "The information," says Mr. Graham, "must come directly from the newly discovered witnesses, so it may appear just what they know, and to what they are

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ready to testify. This, besides being in accordance with the well known rule of law that requires the best evidence, also prevents prevarication, by binding the witnesses to state only what they are prepared to swear to at the trial. Affidavits are required, as well that the statements may be made with proper deliberation, as that they may come supported by the solemn sanctions of a judicial oath." This rule has been established in the following cases: *Sheppard vs. Sheppard*, 5 Halstead, 250; *Mann vs. Clifton*, 3 Blackf., 304; *Bright vs. Wilson*, 7 B. Mon., 122; *Giles vs. The State*; 6 Geo., 276; *Saggs vs. Anderson*, 12 id., 461; *Howe vs. Sproul*, 2 How. Miss., 772. Such has been the practice of this state, *Blood vs. Whitman*, 3 Chand., 54. Neither of these questions arise out of matters resting in the discretion of the court, but are fixed rules of law, which must invariably be complied with.

The order of the circuit court must, therefore, be reversed.

MANNY *vs.* SMITH *et al.*

Heard July 28, 1859.] [Decided February 7, 1860.

Jurisdiction—Justice of the Peace—Pre-emption.

Where in an action of trespass upon lands pending before a justice of the peace the defendant pleaded a right of pre-emption to the premises in question, under the act for the protection of the swamp and overflowed lands, and to grant pre-emption to the same, and also gave the bond required by law: Held, that such a plea ousted the justice of jurisdiction of the cause, and it must be sent to the circuit court for trial.

Under the act the right of pre-emption in the swamp and overflowed lands vests

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such a title to the lands in the pre-emptor, as will maintain ejectment, or any other action to recover possession of the lands.

This action was commenced by William F. Manny against Lafayette Smith and Richard Woolsey before a justice of the peace; the facts of which are sufficiently stated in the opinion of the court.

J. Fordyce and *G. Bouck*, for the appellants.

W. M. Sessions and *S. Crawford*, for the respondent.

By the Court, DIXON, C. J. This is an action of trespass *quare clausum fregit* commenced before a justice of the peace prior to the passage of the code. The defendants pleaded not guilty, and gave notice that they should insist upon and give in evidence that the defendant Smith had a pre-emption right to the premises in question, under and by virtue of chapter 84 of the laws of 1855, entitled "An act for the protection of swamp and overflowed lands in this state, and to grant pre-emption rights thereon." That the several supposed trespasses mentioned in the declaration were acts lawfully done by him by virtue of said pre-emption, and that the defendant Woolsey acted as his servant, &c. With this notice the defendant tendered the bond required by section 53 of chapter 88 of the Revised Statutes of 1849; and the justice certified the cause to the circuit court. Upon trial in that court the plaintiff recovered judgment, and the defendants appealed to this court. Upon the plaintiff's motion, this court struck out the bill of exceptions for irregularity. The cause was then argued upon the record, as it stood without the bill of exceptions, when it was insisted by the defendants' counsel that the defendants' notice did not contain such an averment of title to lands in the defendant Smith as ousted the justice of jurisdiction and authorized him to transfer the cause to the circuit court, and that the circuit court acquired no jurisdiction.

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We are compelled to disagree with counsel. The statute provided that every action "where the title to lands should in anywise come in question" should, upon the defendants' complying with its provisions, be transmitted to the circuit court. The 10th section of the chapter also provided that no justice should have cognizance of any action where the title to real property should come in question. The right of pre-emption set up in the notice was a species of inchoate title. Under it Smith had a vested right to the lands, *Veeder vs. Guppy*, 3 Wis., 533, and was entitled to the *absolute and exclusive* possession. Under a statute precisely like our own it has been frequently held in New York, that the question of the right of possession in the public or a private individual of the *locus in quo* as a public or private road or easement was a question of title which a justice of the peace could not try. *Heaton vs. Ferris*, 1 John., 146; *Striker vs. Mott*, 6 Wend., 465; *Saunders vs. Wilson*, 15 id., 338; *Whiting vs. Dudley*, 19 id., 373. Smith could have maintained ejectment. The thirteenth section of the act declared that the certificate of pre-emption should "be sufficient evidence of *title*, to enable the person making the same to maintain any suit or suits, action or actions, against any person or persons, in any court of competent jurisdiction, for any trespass or injury done to such lands, or any part thereof, or to any buildings or improvements thereon, or to the timber, grass, grain, or other products growing or being thereon, or any proper action or proceeding to recover possession thereof."

The cause was properly certified to the circuit court, and the judgment of that court must be affirmed.

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WOODWARD *vs.* HOWARD.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard August 16, 1859.] [Decided February 7, 1860.

Bill of Exceptions—New Trial—Practice.

Where there has been no motion for a new trial, in the court below, and saved by bill of exceptions, the appellate court will not look into the evidence to see whether it will sustain the finding of the court below.

This was an action commenced by E. A. Woodward, against Jacob M. Howard, as executor of the estate of Mary P. H. Cutler, for the support and maintenance of the child of the deceased. On the trial, the court found for the plaintiff, $59 50, and judgment was entered accordingly, from which the defendant appealed.

Carpenter & Sprague, for the appellant.

J. C. Hopkins, for the respondent.

By the Court, Dixon, C. J. No motion for a new trial having been made in this case, we cannot examine the testimony, but are concluded by the facts as found by the circuit judge. As the facts found by him clearly sustain his conclusions of law, and establish the alleged cause of action against the defendant, the judgment below must be affirmed.

Judgment affirmed.

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MOHR et al. *vs.* GAULT.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard November 17, 1859.] [Decided February 7, 1860.

Water Courses—Nuisance.

Where the outlet of a lake is obstructed by natural causes, so as to raise the waters in the lake, and cover the lands of an adjacent owner, he is not at liberty to drain off the waters by some other channel, conveying them in another direction from their natural outlet; but his efforts must be directed to the removal of the obstruction which caused the back water, leaving the owners along the stream in the legal enjoyment of the natural flow of the waters.

The obstruction of a running stream occasioned by the washing down of its banks, does not in law constitute a nuisance, unless such obstruction is attributable to the acts or agency of man.

This was an action commenced by Oscar Mohr, Francis Fischer, and his wife, against Francis Gault, to obtain a perpetual injunction to restrain him from directing the waters of Black Earth creek from their mill, in the town of Cross Plains. The complaint set forth that the creek had its rise in Mud Lake, in the town of Middleton, which was fed by springs and surface water, out of which the waters flowed west, and down the Black Earth creek. That east of the lake was an inconsiderable and narrow ridge of land, which formed the natural division between the waters flowing westerly down the creek, and those flowing eastwardly into Lake Mendota; that on the east side of the ridge is a large extent of country, known as Big Marsh, the waters of which are discharged through a stream known as Pheasant branch. That Gault was engaged in digging and excavating the earth of the ridge, between the Big Marsh and Mud Lake, for the purpose of draining the waters of Mud Lake into Big Marsh, and thence through Pheasant branch, and out of the Black Earth Creek. The complaint averred the practicability of this undertaking, and the damage to the complainant, and asked for judgment and injunction.

The answer denied that Mud Lake had its outlet through the Black Earth, but that it was through the Big Marsh and

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Pheasant branch, until some twenty years ago, when the channel was filled up, and so raised the waters in the lake, and caused them to cut the channel at the west, down the Black Earth; that the defendant owned a tract of land lying partly in the east end of the lake, over which the waters had been raised, and that he was engaged in draining the waters from his land, so that it would become fit for use.

On the trial before the court, the court having duly considered the allegations and the evidence, found, as matters of fact:

1. That the plaintiffs owned and possessed the lands and improvements, as set forth in their complaint.

2. That they owned an available mill privilege, and were improving the same upon Black Earth creek, as stated in said complaint.

3. That the defendant owned the lands, to wit: the S. W. ¼ of N. E. ¼, sec. 9, and N. E. ¼ of S. W. ¼, sec. 8, Town 7, Range 8, in Dane county, Wis., and situated in said Mud Lake, as stated in said answer.

4. That said lands of the defendant, if divested of the waters of said lake, would be of value to the defendant, and that without they are valueless.

5. That Mud Lake is a body of water formed partially by springs, but mainly by rains and surface waters from the adjacent country, and that it has been subject to rise and fall, as affected by such rains and surface waters.

6. That there are at least two springs in the bottom of said lake, of the depth of seven feet; that the depth of said lake varies from two to seven feet; that throughout said lake there is open water, but that the main body is covered with vegetation.

7. That the lands of the defendant are covered with the waters of said lake, one tract of the depth of from two to three feet, and the other of a few inches.

8. That no springs are situated upon said lands of the defendant.

9. That the outlet of said lake, forming the head of Black Earth Creek, is about six feet wide, and the waters passing out of the same about one foot in depth.

10. That the defendant has excavated a ditch at the north east end of said lake, of sufficient depth to carry off the surface water of said lake to some extent, and threatens to continue excavating the same sufficient to draw off the water of said lake from the lands of the defendant.

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11. That there is no perceptible fall from one end of said lake to the other.

12. That the waters of said lake have in the last twenty years been so high as to flow over the bank at the north east end of the lake, into the Big Marsh, towards 4th Lake, in instances of very high water.

13. That the place where said waters run into the Big Marsh, has since been raised by the cultivation of the land.

14. That the surface of the water of said Mud Lake is about seven feet higher than the ground in the Big Marsh.

15. That if the said ditch is excavated sufficiently deep, the whole of said Mud Lake may be drained into the Big Marsh.

16. That the outlet of said Mud Lake towards Black Earth creek has been filled up one foot and a half, by reason of a highway on one side, and cultivated land on the other, and the washing of the earth therefrom.

17. That the lands of the defendant have at some time, or some portion of them, been dry enough to cut hay therefrom.

18. That the natural flow of the water of said Mud Lake, at a natural stage of water, is into Black Earth creek.

19. That the said outlet into Black Earth creek can be easily excavated, so as to drain the lands of the defendant, without injury to the natural amount of water.

20. That the lands on the north and south sides of said lake, and the outlet into the Black Earth creek, are high and bluffy.

21. That the waters of said lake have been raised one foot and a half, by the artificial filling up of the outlet towards Black Earth creek, and that they have been raised even more than that, by surface waters running into said lake, from the adjacent country.

The conclusions of law upon these facts are:

1st. That the defendant has the right in any way to drain his said lands, by letting off the surface waters of said lake, to the depth of three feet, without injury to the natural flow of said lake towards Black Earth creek.

2d. That the waters upon the lands of the defendant constitute a private nuisance, which the defendant has a right to abate, in his own way, without committing a breach of the peace.

3d. That the defendant has the right to draw off the waters of said lake, to drain and reclaim his said lands, and that he

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can do so without injury to the natural course and flow of the same to the premises of the plaintiff.

The judgment of the court will be, therefore, that the defendant be restrained from lowering said lake, by his excavation of the north east end of said Mud Lake, more than sufficient to drain his said lands.

On this finding it was adjudged, ordered, and decreed, that the said defendant, Francis Gault, and his agents, be, and they are hereby perpetually restrained and enjoined from digging and excavating the earth between said Mud Lake and Big Marsh, so as to drain and lower the waters of said lake more than three feet, the depth ascertained in said finding and decision to be sufficient to drain the said lands of the defendant, and from draining and lowering the waters of said lake in any other way or manner, more than three feet, than by and through the natural outlet of said lake into Black Earth creek; and it is further adjudged that each party pay the costs respectively incurred by them in this suit.

From which judgment this appeal is taken, by the plaintiffs.

Abbott, Gregory & Pinney, for the appellants.

S. Crawford, for the respondent.

By the Court, Dixon, C. J. It seems to us that the facts found by the circuit judge do not sustain his conclusions of law. As facts, he finds that Black Earth creek is the natural outlet for the waters of the lake; that at its source it is about six feet wide, and the waters passing out of it about one foot in depth; that it has been filled up about one foot and a half, by reason of a highway on one side, and cultivated land on the other, and the washings of the earth therefrom; and that from one end to the other, there is no perceptible fall in the lake. As conclusions of law, from these facts and others, touching the defendants' title and occupancy of lands bordering upon and overflowed by the waters of the lake, which we need not here repeat, he finds that the defendant has the right *in any way* to drain his land, by letting off the surface water of the lake, to the depth of three feet, without injury to

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the natural flow of the lake towards the creek; and that the waters upon the lands of the defendant constitute a private nuisance, which the defendant has the right to abate, in his own way, without committing a breach of the peace.

It is difficult to perceive how the first conclusion is supported by the facts. If there is but one foot of water flowing over the bed of the creek at the point where the waters of the lake enter it, and there is no perceptible fall, or difference in the height of the surface of the lake from one end to the other, as was found, and as appears to have been mathematically demonstrated, how can the defendant be permitted, by a ditch turning the waters in an opposite direction, into Big Marsh, to drain the lake to the depth of three feet, without entirely destroying the flow of waters into the creek? Certainly he cannot. The present bed of the creek would then be about two feet above the surface of the lake. If it was reduced one foot and a half, to its original condition, it would still be one half foot above the surface of the water in the lake, after it was so drained.

It may be doubtful, from the facts found, whether, according to the definitions given in the books, the obstructions at the head of the creek, occasioned by the washing of the earth, is or is not a nuisance. If the washing in of the earth was purely accidental, and not directly attributable to the acts of man, it would not be. Blackstone defines a nuisance to be "anything that worketh hurt, inconvenience, or damage," and treats of it throughout as something brought about through human agency. Bishop, Vol. 2, § 848, says, "that all acts put forth by men, which tend directly to create evil consequences to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of courts." It is not, however, necessary for us to determine here whether this obstruction is or is not a nuisance, for if it is, the defendant's remedy lay in abating it, if he

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could do so by peaceable means; and if not, he must resort to his action for that purpose. If it is not a nuisance, as defined in the law, but an accidental obstruction, he must either endure it, or proceed to remove it; and which, we will not here attempt to say. According to the doctrine laid down in *Prescott vs. Williams*, 5 Met., 429, he might perhaps remove it, as being necessary to the use and enjoyment of his lands. In neither case has he the right to rid himself of the annoyance by diverting the waters of the lake from their natural outlet. The owners along the creek have a legal right to the natural and usual flow of the waters of the lake through it; and the efforts of the defendant must be directed to the removal of the obstruction or cause of the backwater, which in law constitutes the nuisance.

The judgment must be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

THE STATE *ex rel.* S. D. CARPENTER *vs.* SAMUEL D. HASTINGS, State Treasurer.

APPLICATION FOR MANDAMUS.

Heard January 17, 1860.] [Decided February 21, 1860.

Construction of Statutes—Secretary of State—Bank Comptroller—Mandamus.

Where the law clothes an officer with discretionary powers, he must exercise the power upon his own responsibility; but the duty of interpreting the constitution and laws devolves on the court and not on the officer.

If an officer act without authority, it is the duty of the court to declare the action illegal; and it is not bound by the interpretation which the officer may have given to the law.

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If the Secretary of State allow a claim, which may in law be a proper claim, the court will not examine into it; but if he allows a claim against the law, his decison is not final.

The Bank Comptroller has authority to order such printing as is necessary or convenient for the use of his department, but not such as is not so authorized.

Whether certain printing, ordered by the Bank Comptroller, was authorized by law. *Quere.* The question may be both of fact and law depending on each case.

The law does not seem to authorize the Bank Comptroller to make use of bank statements, or impose upon him any duty in the performance of which they might have been used.

A motion to quash an alternative writ of mandamus will be granted unless the relation show a clear right to the writ.

Where the relation for a mandamus leaves the right of the relator in doubt, and the writ is quashed for that reason, leave will be given to amend.

On the 22d of November, 1859, S. D. Carpenter filed in the supreme court a relation against Samuel D. Hastings, the treasurer of the state, avering that one James Ross was the contractor to do the public printing; that on the 19th of July, 1859, the Bank Comptroller ordered from Ross, for the use of his office, 125 quires of blanks of the statement of the condition of the banks of the state, on medium paper, printed on both sides; (the order is set forth at length); that Ross printed and furnished the blanks under his contract to do the public printing. On the 15th of September, 1859, Ross presented his account for printing the blanks, to the Secretary of State, who audited and allowed the account at the sum of $7,501, and certified the same to the defendant, the Treasurer, for his payment; that the account so audited has been assigned to Carpenter; that on the 14th of November, 1859, he had notified the treasurer of the assignment, and demanded payment of the audited claim; which he refused to do.

On the tenth of December, 1859, the then attorney general, Gabriel Bouck, moved to quash the alternative writ of mandamus, which had been issued, and assigned the following causes:

"1. The Bank Comptroller had no authority, at the cost of the state, to order, or procure the printing by the said Ross, of the statements of the condition of the banks, or blanks, in said writ named, or any part thereof, or to contract in any manner for the printing of the same, or any part thereof so as to bind the state.

"2. That the said Bank Comptroller had no authority to

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order, request, or cause to be done, at the cost of the state, any of the said printing named and referred to in the said writ and petition, or any part thereof, or to contract in any way for the printing of the same so as to bind the state.

"3. That the said printing of the said blanks, or statement of the condition of the banks, in the said writ mentioned, having been ordered by the Bank Comptroller without any authority of law, the state was not legally bound to pay for the same, and therefore the Secretary of State was not authorized by law to audit the said Ross' account therefor, and to make said order; and the said auditing and said order are illegal and void, and the State Treasurer was justified in refusing to pay the same."

G. B. Smith and *S. D. Carpenter*, for the relator.

1. The Secretary of State is auditor *ex officio*. Const., Art. VII., § 2. And the law prescribes his duties. He is to examine and settle accounts of all persons, &c., and certify the amount or balance to the treasurer. Rev. Stat., chap. 10, § 27.

There is no discretion given to the Treasurer anywhere in the law to refuse to pay warrants drawn by the Secretary of State as auditor; but on the asking he is required by law to pay all sums certified by the Secretary of State, Rev. Stat. chap. 10, § 40, in the order in which they are presented; id. The Treasurer is not the auditor, nor has he any of the powers of an auditor, either by the constitution or the law.

1. This work was done under a contract created by law. Laws of 1858, chap. 114.

The State Treasurer, whose duties are prescribed by law, is positively required and directed to pay these printing accounts, when the Secretary of State draws his order for that purpose. The law is positive and peremptory, and the contract plain and explicit; leaving no discretion whatever with the Treasurer, but to pay on the order of the Secretary of State.

The Secretary of State is appointed by the constitution, and is, by the printing law and the contract, the sole officer to adjust and settle such accounts, and the Treasurer is not vested with any discretion or authority to question such settlement.

The Bank Comptroller is the chief officer of the department,

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and he is invested with authority and power to order the printing for his department, and the treasurer has no legal right to question the propriety of his orders for printing, and to do so is a piece of official meddling on his part, not justified by the case or the circumstance, even if he were invested with such extraordinary power. But it cannot be conceded or admitted for a moment that the state treasurer has a legal, or any right whatever to act as auditor or adjuster of accounts for the state. His duty is plainly pointed by the law. And the judgment and decision of this court, it is respectfully submitted, should be such, and in such style, as will forever hereafter prevent the like official meddling on the part of this officer, or any other who shall succeed him. With his construction of the law, and his duties respecting accounts audited, every creditor would be directly at the mercy of the treasurer. Such was not the intention, and such is not the law.

By the banking law the Bank Comptroller is especially directed to have certain bank statements published in a newspaper, but he is not restricted to that printing. He may order under the authority above cited, whatever, in his opinion, he may think necessary and proper for his department, and he is to decide and order, and the printer *must obey* the order and do the printing.

By the Court, PAINE, J. This was an application for a *mandamus* to compel the treasurer to pay an account for printing which had been audited and allowed by the Secretary of State. The Attorney General, on behalf of the Treasurer, filed a motion to quash the alternative writ, upon the ground that it appears from the relation that the account was not a legal claim against the state.

The facts set forth are that the Bank Comptroller ordered the printing of twenty-five quires of the statement of the condition of the banks for the use of that department; that they were printed accordingly, and the account for them, which is the one in question, was properly audited and presented for payment, and payment refused.

The whole matter turns upon the question whether the

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Bank Comptroller had lawful authority to order this printing done. In section 12, chap. 6, revised statutes of 1858,95, it is provided that "the printing of the several departments shall be subject to the order of the respective officers thereof," and further, "no order shall be given for any work not absolutely required for the use and convenience of such office, and in quantities within the actual requirements of the department making use of the same."

It was contended by the counsel for the relator, that the law vests in the officers of the several departments, a discretion to decide what printing shall be ordered for their departments respectively, and that it was an unwarrantable interference with that discretion, for this court to inquire into the propriety of its exercise, or to attempt in any manner to control it. The argument may be good when applied to the action of those officers within the limits of the authority confided to them by law, and certainly it is not necessary for us to disclaim any desire or intention to interfere with their action within those limits. Where the law clothes them with a discretionary power, they must exercise it upon their own responsibility; but it will not be denied, that upon this court, and not upon any other officer or department of the state, is devolved the duty of interpreting its constitution and laws. And we have no doubt, that whenever the question is properly brought before us in a judicial proceeding, and it is made to appear that any officer has acted without authority, it is our duty to declare such action illegal. And in determining it, we are not bound by the interpretation which such officer, or any other officer, may have put on the law declaring his powers. If we were, then he would constitute the highest judicial tribunal with respect to such laws, and this court would be divested of that character.

If the Secretary of State audits and allows a claim which in law may be a proper claim against the state, then, whether

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he allows too much or too little, his action cannot be reviewed here; but if he allows a claim which is against law, although he may have held it to be legal, we do not think his decision as its legality is final; for, although he must decide it in the first instance for himself, yet he is not vested with the power to decide authoritatively upon questions of law; but that power, however imperfectly it may be exercised, is devolved upon the judicial department. *Commonwealth vs. Fowler*, 10 Mass., 305. There can be no doubt, that under the provisions before referred to, the Bank Comptroller had authority to order whatever printing was necessary or convenient for the use of that department. But it must be necessary or convenient in the discharge of some duty required by law. The law has prescribed definitely what his duties are, and whatever printing may be necessary or convenient in performing them, he is authorized to order. But he is not clothed with any power of legislation with respect to the interests of that department. He cannot assume any new duties not authorized, and thereby vest himself with the power to order whatever printing might be convenient or necessary in their discharge.

The question in this case, therefore, is, whether the statements of the condition of the banks, which were ordered printed, were necessary or proper in the discharge of any duty required by law of the Comptroller. We have had some difficulty in determining whether this is a question of law, or of fact, or of both. What the duties of the department are, is matter of law. Those duties being ascertained, whether certain printing was necessary or convenient in their discharge, might involve an inquiry into facts. Though it is somewhat difficult to see how it could be presented as an issue of fact to a jury, without involving a decision by them as so what the duties of the department were, which is matter of law.

In *Barker vs. Mechanics' Ins. Co.*, 3 Wend., 94, the action

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was on a note given by an insurance company, and it was objected on demurrer, that the company had no authority to give notes. But the court said it might give notes for office rents, payment of officers, agents, &c., and therefore they could not on demurrer, hold it void. They seemed to consider it necessary to be able to point out some purpose for which the company might lawfully give a note, in order to answer the demurrer. And we have had considerable doubt whether, in accordance with the same principle, we should not be able, in answer to this motion, to say, as a matter of law, that there is some duty required of the Bank Comptroller, in discharging which these statements might be used. If it were to be so considered and held entirely a question of law, we should be unable to point out any such duty. For, after carefully examining the several statutes having reference to the subject we can find no law requiring or authorizing the Comptroller to make any use of such statements, or imposing upon him any duty in the performance of which they might be used. And none such was suggested upon the argument.

Without, however determining the precise character of the question, we think the motion to quash must be sustained upon the ground that it devolves upon the relator to show a clear right to the writ before it is awarded. And having set forth the character of the work ordered, even though we might not be able to say that it could not be used in performing any duty of that department, yet we are certainly unable to see, or say that it could be so used. And if it could not, then it was ordered without authority, and there is no law appropriating money for its payment.

The relator has therefore at least left his right in doubt, and the motion must be sustained, with leave to amend if it is desired.

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STATE ex rel. CRAWFORD *vs.* HASTINGS, TREASURER &c.,

and

STATE ex rel. PROUDFIT *vs.* HASTINGS, TREASURER, &c.

ALTERNATIVE WRITS OF MANDAMUS.

Heard together August 12, 1859.] [Decided February 28, 1860.

Auditor of State—State Comptroller—State Treasurer—Constitutional Law—Offices, Terms of.

I.

The act of May 17, 1858, providing for the appointment, and prescribing the powers and duties of a comptroller, and making it his duty to examine and pass upon all claims and accounts audited by the Secretary of State, and to countersign the same before they shall be paid by the State Treasurer, is in violation of the constitutional provision, which declares that the Secretary of State shall be "*ex-officio* auditor." The legislature cannot deprive an officer of power given him by the constitution, nor transfer it to another. COLE, J., dissenting.

The deputy of the Secretary of State cannot perform the duties of auditor of state in place of the Secretary. It is a personal trust, and cannot be delegated. COLE, J., dissenting.

A certificate of the examination and allowance of an account made and signed by the deputy secretary of state, may be rejected by the treasurer on presentation for payment, and a mandamus will not be granted to compel its payment. COLE, J., dissenting.

The act of 1854, providing that the terms of office of judicial officers shall commence on the first Monday of each year, next after their election, does not apply to the justices of the supreme court. Their terms of office commence on the first day of June succeeding their election. COLE, J., dissenting.

Though the Secretary of State, in his capacity of auditor, is authorized to do all necessary acts connected with auditing accounts and claims against the state, and to certify them to the treasurer for payment, and although he is for that purpose the general agent of the state, it does not, therefore, follow that the treasurer is obliged to pay all claims audited by the secretary, when it is plain that he had no authority to allow the claim.

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Public agents, who act in violation of their authority, that is, of public law, do not bind the public by such illegal acts; and all men are bound to take notice of the authority of such agents:

II.

The act of 1858, relating to the assessment of taxes, and providing that the Secretary of State should prepare and print the *forms* necessary to carry the act into effect, and forward the same to the clerks of the boards of supervisors of the counties, who should cause to be printed for the use of the assessors of their respective counties, the necessary number of such blanks, did not authorize the Secretary of State to procure to be printed, 135,000 copies of such blanks, at the expense of the state; and the State Treasurer was justified in refusing to pay for such printing, even though the secretary had audited the same.

The relation filed in the case by Samuel Crawford, set forth that he had been elected to the office of Associate Justice of the Supreme Court, and entered upon the duties of the office on the first of June, 1853. That the act of January 3d, 1854, fixed the commencement of the term of the judges of that court to the first Monday of January after the election; and thus extended the term of his office to the first Monday of January, 1856; that his successor was elected in April, 1855, and by the law entitled to enter upon the duties of his office in January thereafter. The relator received his salary up to the first day of July, 1855, and not thereafter, though he had resided all that time in the state, and had not resigned. On the 20th of May, 1859, he had applied to the Secretary of State, who was by the constitution of the state declared to be the auditor of the state, to audit and allow the claim of the relator for the sum of $1000, the amount due him for his salary from July 1855 to January 1856, who audited the same on the 27th of the same month. That on the 6th June, 1859, he presented the warrant for payment to Samuel D. Hastings, the Treasurer of the State, who refused to pay the same. Therefore, he prayed for an alternative writ of mandamus.

The writ was issued on the 22d of July, 1859, and on the 8th of Aug., 1859, the respondent answered, denying that the relator was a justice of the supreme court from the first of July, 1855, to the first of January, 1859. He further answered, that in case this court should be of the opinion that by the law the relator was entitled to hold the office from the first day of July, 1855, to the 1st of January, 1856, then the

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respondent averred that the relator, not wishing to hold, use, or enjoy the said office, or to do, exercise, or perform the duties; or to claim, have, or enjoy the rights, privileges, emoluments, or salary of the office, during that period; that he did of his own free will and choice, during all that time, leave and abandon the office, which during the time so unclaimed, unoccupied, and unused, was held used, exercised, and enjoyed, and the duties thereof performed, and the salary thereto attached, was drawn and received from the State Treasury by Orsamus Cole, who was before that time duly elected and qualified as a justice of said court, in place of the relator, with his knowledge and assent. The answer further averred, that all the money by law appropriated to pay the salary of the justices of the supreme court from July, 1855, to January, 1856, had been drawn from the state treasury, and was paid by the treasurer to the persons who, during the time, in fact were the judges constituting said supreme court, and exercising the duties and performing the functions of said court, to-wit., Chief Justice Whiton, Justice Smith, and Justice Cole. That there was not now, in the treasury of the state of Wisconsin, any money applicable to the payment of the claim of the relator. And the answer further averred, that the account and claim of the relator so presented for payment by the respondent at the state treasury, was not, as required by law, countersigned by H. A. Tenney, Comptroller of the State of Wisconsin. Wherefore he had refused to pay the amount claimed by the relator, and submits that he ought not to be compelled to pay the same, or any part thereof, out of any funds in his hands as State Treasurer.

To this answer the relator filed a general demurrer.

A. D. Smith and *Geo. B. Smith*, for the relator.

1. The term of office did not expire until January, 1856, and for the full term he has a right to the salary. He never resigned, and never was lawfully ousted. *Vide.* The Constitution, Art. VII, § 15; R. S., 1849, p. 762, § 19; id., 1852, p. 603, § 6; id., 1854, p. 53, § 1; *Johnson vs. Wilson*, 2 New Hamp., 202; *Breese vs. Fox*, 1 Dana, 447.

2. The Secretary of State is, by the constitution, the auditor of all accounts against the state, Constitution, Art. VI, § 2. And therefore, it appearing that the warrant to the relator for the amount claimed, had been duly examined, audited and directed to be paid to said relator by said respondent, it be-

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came his duty to pay the same, and having refused the payment, the peremptory writ herein should issue.

3. The warrant of the Secretary of State was in due form, and the payment of the sum of money therein allowed, being a ministerial act, should have been obeyed by him as a mere ministerial officer.

4. The power to audit and allow claims against the state, whether for salaries of public officers or for other services, having been by the constitution, vested in the Secretary of State, no mere act of the legislature could divest him of that power; and the Secretary having exercised it, the power in the given case was exhausted, and it could not become necessary a second time to submit the same to the action of the officer styled "State Comptroller," to ascertain the correctness and legality of the claim, it having been once determined.

5. It was the design of the constitution to place the judicial department of the government, and the members composing the same, beyond and outside the control of any other officer of the government; for this was essential to the independence of the department,, and this was accomplished by affixing the minimum salary of the judges, and prescribing the time or times when that salary should be paid.

6. The legislature having fixed the salary of the judges, and the time and mode of payment thereof, could not alter or change the same during the term of the incumbent. Constitution, Art. IV, § 26.

7. The constitution of the state, or rather the people who saw fit to adopt it, saw fit also to create, and did create, a distinct department of the government of the state, called "administration." Constitution, Art. VI.

8. In prescribing the duties of the several "administrative officers designated in that article of the constitution, the duties of the several members thereof were specifically defined, and the people in adopting the constitution, asserted their willingness to rest upon such guaranties as they had therein provided, and thereby prohibited the interpolation of any other or different agencies. For it is well known in the adoption of fundamental law, it is equally, if not more important, to guard against the *intrusion of unauthorized power*, than to curb and restrain the authorized functionaries essential to its harmonious working.

9. The payment of money by the treasurer out of a specific appropriation, to a person, or in a manner unauthorized by

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law, is no payment, and in contemplation of law, such money still remains in the treasury.

C. Abbott, for the respondent.

By the Court, Dixon, C. J. The position contended for by the respondent's counsel, that the act of May 17th, 1858, providing for the appointment and prescribing the duties of a Comptroller, *does not* invest that officer with power to supervise and control the action of the Secretary of State as auditor, seems to us wholly untenable. It cannot be maintained by any fair construction of the act. The intention of the legislature to clothe him with authority equal to that exercised by the Secretary on all matters pertaining to the indebtedness of the State and claims against it, is manifest from the language used in the second and fifth sections. The second section provides that "the Comptroller shall *examine and pass upon all claims and accounts* audited by the Secretary of State, and if he shall find the same properly verified or proved, and *authorized by law to be audited*, he shall certify that fact upon such claim or account." By the fifth section it is enacted that "he shall countersign all warrants drawn by the Secretary of State upon the State Treasurer, *which shall be authorized by law*, and no warrant shall be paid by the State Treasurer unless the same shall be countersigned by him," &c. The intention to confer upon him the same power possessed by the Secretary in his capacity of auditor, to subject finally to his judgment and determination, all questions touching claims and accounts against the state, as well as to their substance, validity and existence, as to the form in which they are presented and verified, and to give him authority to veto and render inoperative all acts of that officer, whether the same were legally and properly done or not, is so manifest from the foregoing provisions, that comment is deemed unnecessary.

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Section two or Art. VI, of the constitution, prescribes in general terms, the duties of the Secretary of State, and among other things, declares that "he shall be *ex officio* auditor." An auditor may, in general, be defined to be a person appointed to settle and adjust accounts, and state or certify the results. In a more restricted sense, he may be said to be an officer whose duty is to examine and verify the accounts of persons entrusted with the receipt and disbursement of public moneys. Bouvier's Law Dic., title "Auditor;" Burrill's id., same title. As used in our constitution it signifies an officer whose business is to examine and certify accounts and claims against the state, and to keep an account between the state and its treasurer. Since the ratification of that instrument such has been the commonly accepted and uniform legislative interpretation of the word. Immediately after the formation of the state government, the legislature, by act, recognized and specifically prescribed the manner in which the powers and duties of the Secretary, as auditor, should, in both these respects, be exercised and performed. Chapter 9, R. S., 1849, sec. 19 to 25, inclusive. An enumeration of those powers and duties as there regulated, are unnecessary. With the exception of some enlargements, made necessary by subsequent legislation and the formation of new departments, they remain the same to this day. Chap. 10, R. S., 1858, secs. 27 to 37 inclusive. Even by the act in question, no direct attempt was made to impair or modify them. All accounts and demands against the state are in the first instance to be audited by him in the usual manner. But after they are so audited, it is made the duty of this new officer, created for that purpose, to review and correct them; and if in any respect he deems them illegal or improper, he is empowered to set them aside and annul his action. The act taken altogether looks like a studied effort to attain indirectly what it was evident to the framers, could not be accomplished directly. The result is,

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that we have two auditors instead of one, both of whom must act in succession, before any business can be transacted. The question arises whether, under the foregoing provision of the constitution, the legislature have the power to create a second auditor or officer authorized to perform the same duties, whose concurrence is necessary before the acts of the constitutional auditor shall take effect. We think they have not, and that the functions of that officer cannot, in whole or in part, be transferred to, or be exercised concurrently, or otherwise, by any other person or officer. It falls directly within the rule that the express mention of one thing implies the exclusion of another. *Expressio unius est exclusio alterius.*

This rule applies as forcibly to the construction of written constitutions as other instruments. And if its observance ought in any degree to depend upon the character or importance of the instrument under consideration, then no other cases demand so rigid an adherence to it. A constitution being the paramount law of a state designed to separate the powers of government and to define their extent and limit their exercise by the several departments, as well as to secure and protect private rights, no other instrument is of equal significance. It has been very properly defined to be a legislative act of the people themselves in their sovereign capacity; and when the people have declared by it that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge by any other officer or department, are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department, implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed. This result could be as effectually accomplished by the creation of new officers and departments exercising the same power and jurisdiction, as by the direct and formal abrogation of

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those now existing. And, although the exercise of this power by the legislature, is nowhere expressly prohibited, nevertheless they cannot do so. The people having in their sovereign capacity exerted the power and determined who shall be their auditor, there is nothing left for the legislature to act upon. This principle or rule of construing constitutions, has been often laid down and acted upon by courts. It is fully sustained by the following cases recently decided by the court of appeals of New York. *Barto vs. Himrod*, 4 Seld., 483; *Sill vs. The Village of Corning*, 15 N. Y., 297; *People vs. Draper*, id., 532.

In this last case the court, after observing that plenary power in the legislature, for all the purposes of civil government, is the rule, and a prohibition to exercise a particular power an exception, and that the constitution contains but few positive restraints upon the legislative powers, say: "But the affirmative prescriptions, and the general arrangement of the constitution, are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The form of the government; the grant of legislative powers itself; the organization of executive authority; the erection of the principal courts of justice, create implied limitations upon the law making authority, as strong as though a negation was expressed in each instance." This rule of construction extends to every part of the instrument, and if a violation of it is allowed in the case of the auditor, it is difficult to see why it should not be in the case of any other officer or department. Thus, the legislature might with equal propriety create new courts of justice, usurping and exercising the same power and jurisdiction as those established by the people, and a new executive, to correct the mistakes and control the action of the one chosen by them. It seems to us clear, that the legis-

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lature could do neither, and that so much of the act under consideration as attempts to transfer to the so-called comptroller the functions of auditor, and to clothe him with authority to control or reverse the acts of that officer, is unconstitutional and void.

These remarks apply with equal force to the practice of permitting the deputy or assistant secretary of state to discharge the duties of auditor. An examination of the statute regulating them, and a moment's reflection, will show that it is an office of great trust and responsibility, the importance of which cannot easily be overestimated. Vast interests are committed to his keeping. In one sense, the entire moneys of the state are under his control. None can be paid out, no disbursement made, without his sanction. All claims and demands against the state must be submitted to his decision. In many respects, his acts are judicial in their nature, and depend upon the exercise of a sound judgment. They are also, in many respects, as we shall presently see, final and conclusive. We are therefore of opinion that it is a personal trust and confidence reposed in him, which cannot be delegated to or exercised by another. It would be unreasonable to suppose that the people, after having entrusted to him the management of such weighty affairs, and provided that they should have a direct voice in choosing him, intended that he might transfer it to any person whomsoever. The relator's certificate is therefore irregular, and payment thereof by the treasurer was for that reason properly refused.

Another point raised and discussed on the argument of this case was as to the constitutionality of the act of 1854, entitled "an act concerning the terms of office of judges of the several courts of this state." Chapter 41, General Laws, 1854. At the argument no question was made upon the construction of the act itself. It was conceded, on both sides, that the legislature intended to change the time of the commencement

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of the terms of office of the justices of this court, if they had the power so to do; which it was insisted by respondent's counsel they had not. This was the question argued. Upon this question it was understood that this court had heretofore, on different occasions, resolved, in relation to the time when the justices elected since the passage of that act should take their seats, that the act was constitutional. With these resolutions I was not inclined to disagree, but to regard them as decisive. From this, Mr. Justice Paine dissented. Accordingly, in the statement of the points decided, which, to meet the request of the parties that a decision might be made at once, and in advance of a written opinion, was hastily penned and filed, immediately after the case was submitted, we held, that the act was constitutional.* Since that time, however, I have examined the act more fully, and have concluded that the legislature did not intend to change the terms of office of the justices of this court. This conclusion renders it unnecessary for me to express any opinion upon its constitutionality. This question is fully discussed by Mr. Justice Paine, in his opinion dissenting from the statement so prepared, before this was written, and I wish to say no more upon it, than that I fully concur in the views taken by him. This may perhaps be regarded as a singular instance of the advantage of having a dissenting opinion prepared in advance of that of a majority of the court.

Another question much discussed on the argument, was as to the effect to be given to the decisions and certificates of the secretary of state, as auditor. This question, owing to the irregularity of the certificate issued, is not, strictly speaking, before us. Yet, as it may be said to be fairly raised, in the case of the *State ex rel. Andrew Proudfit*, against the same respondent, which was argued and submitted at the same time with the present, and as it is intended that this opinion

* See note at the end of these cases.

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shall cover the main points of both cases, it may not be improper to discuss it here. On the part of the relator it was insisted that the secretary of state, as auditor, was the general agent of the government, empowered to determine all claims and demands upon the treasury, and that when he has done so, and has drawn his warrant upon the treasurer, it is conclusive upon the state, as his principal, and upon every other officer, and that in such case the treasurer has no right to refuse payment. The first part of this proposition may be very true. It is said in *Commonwealth vs. Fowler*, 10 Mass., 290, that "the several departments of the government, the legislative, the executive and the judicial, are the agents of the people, in their respective spheres."

And in respect to the auditor, to whom there is a delegation of authority to do all acts connected with accounts and claims against the state, and to certify them to the treasurer for payment, it may be said that he is a general agent. But it by no means follows therefrom, that all his acts are conclusive upon the state. There is a broad distinction in this respect between the acts of general agents of the public and those of general agents of private individuals or corporations. Whilst the latter may, and oftentimes do, bind their principles, when acting beyond the scope of their authority or instructions, yet the former never can. In the case of the latter, it is enough that the agent be apparently clothed with authority to do the act, and that third persons deal with him innocently; then, although he violates the private instructions and directions of his principal, yet he will be bound. Good faith requires this, for he has held him out to the public as competent to do the acts, and to bind him thereby. But it is not so with public agents of the character under consideration. Their warrant of attorney is a part of the law of the land, of which all men, whether they be acting in a public or private capacity, are bound to take notice. They can have

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no private instructions, and all men deal with them at their peril, in case they exceed their powers. On this subject I cannot do better than to use the language of Judge Story, as found in § 307, of his work on Agency. He says: "In respect to the acts, and declarations, and representations of public agents, it would seem that the same rule does not prevail, which ordinarily governs in relation to mere private agents. As to the latter, as we have seen, the principals are, in many cases, bound, where they have not authorized the declarations and representations to be made. But in the case of public agents, the government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or he is employed, in his capacity as public agent, to make the declaration or representation for the government. Indeed, this rule seems indispensable, in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the government."

Our conclusion, therefore, is that it is the duty of the treasurer in common with every other person to take notice of the extent of the authority of the auditor as a part of the law of the state, and if, as in the present instance, the auditor allows and draws his warrant upon him for the payment of a sum of money, as the salary of a person who was not known or recognized as an officer of government, and did not act as such, or which had under the direction of the same or a previous auditor been paid to another, it was his duty to refuse payment, and thus bring the matter before the courts whose province it is finally to solve and settle all disputed and doubtful questions of law. On the other had, when the

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authority of the secretary is clear and provision has been made by law for the payment of the claim audited, then, notwithstanding he may think he has allowed too much or committed an error, still he should not refuse payment. Wherever there has been an appropriation made and power is given by law to the secretary to adjust and determine the amount of the claims to be paid, his decision is final; and it is not for the treasurer or any one else to revise or correct his action.

The demurrer to the return must therefore be overruled.

PAINE, J. I dissent from the conclusion of the court in this case that the relator was entitled to hold the office of justice of this court from the first of June, 1855, to the first of January, 1856. My reasons are as follows: The constitution Art. VII. sec. 4, provided that the legislature might organize a separate supreme court, but that when so organized, it should "not be *changed* or discontinued." The court was organized by the act passed in 1852, for that purpose; the third section of which provided that the term of office of all the justices should commence on the first day of June 1853, that the term of the chief justice should expire with the last day of May, A. D. 1857, that of one of the associate justices should expire with the last day of May, A. D. 1855, and that of the other with the last day of May, A. D. 1859. The relator was one of the justices first elected, and drew the short term, so that by the act organizing the court, his term would expire with the last day of May, 1855. It is conceded that such would have been the result if this act remained in force. And by section 7 of the same act, the term of office of his successor would have commenced on the first day of June, 1855. But in 1854, an act was passed which is as follows: "The term of office of county judges, circuit judges, and justices of the supreme court, shall be for such time as at pres-

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ent prescribed by law, *and shall commence on the first Monday of each year next after the election of such officer*, unless otherwise specially provided." And it is claimed that this act had the effect to make the term of Justice Cole, who was elected as the successor of the relator, commence on the first Monday of January, 1856, he having been elected in the spring of 1855, and that, consequently, the relator was legally entitled to hold the office until 1856, under that provision that the justices shall hold until their successors are elected and qualified.

It seems that in fact this act was overlooked at the time, and Justice Crawford relinquished the office, and Justice Cole entered upon the exercise of its duties without question. But the relator contends that in strict law he was entitled to hold the office till the first of January, 1856. And this would have been so if the act of 1854 had the effect claimed for it. But I think it did not, and could not, have that effect.

First, it did not, because the act cannot by any fair construction be held to show any intention on the part of the legislature to change the time of the commencement of the term of office of the justices of this court. On the contrary, their language clearly indicates an intention to prevent that effect. For the act organizing this court, as before stated, explicitly provided that the term of office of its justices should commence on the first day of June next after their election. This act of 1854 first makes a general provision as to the length of the term of all judges, and then provides that the term shall commence on the first Monday of January, "*unless otherwise specially provided.*" Now, as to the the term of the justices of this court, it was otherwise specially provided. And, therefore, their terms as to the time of commencement were excepted from the operation of the act, by language as clear as it is possible to use.

But, it may be asked, why were they mentioned at all in

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the act, if their terms were not intended to be included in this provision? I reply that the legislature seem to have considered it necessary to re-enact generally, that the term of all judges should be for such time as was then prescribed by law. Now this may not have been necessary. But the legislature evidently conceived it to be so; and, thinking so, they might just as well say that the term of the justices of this court should be for such time as was then prescribed by law, as to say the same of the terms of the other judges. It is difficult to see any necessity for the provision at all, but assuming it necessary, as the legislature did, it was just as necessary to include the judges of this court, as the circuit judges, or any other; and that sufficiently explains the use of language including them. But the legislature knew that the time of the commencement of their terms was specially provided for by the law organizing the court. And, therefore, when they come to fix the time for the terms to begin, they expressly limit the application of that provision to cases "not otherwise specially provided" for. It cannot therefore be held applicable to the terms of the justices of this court, without entirely striking out this material provision of the statute. Where the statute says that all terms not otherwise specially provided for, should commence on the first Monday in the year next after the election, it would be construed to mean that those terms which were otherwise specially provided for, should commence at that time, as well as those that were not. I know of no rule of construction that can justify courts in taking such a liberty with statutes. Where different provisions are repugnant, the court may give effect to the one which seems most in accordance with the general intent. But the rule is well settled that laws must be so construed as to give effect to all parts if possible. And here there is no repugnance between the different provisions of the act, and to construe it as including the terms of the judges of this court

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gives no effect whatever to the language, "unless otherwise specially provided."

There was a reason for the act with this qualification. Because while the terms of the judges of this court were specially provided for, there was considerable doubt and uncertainty as to the time of the commencement of the terms of the circuit judges. The original act providing for their election did not prescribe the time, and in some of the judicial circuits afterwards organized, the time for the terms to commence was not fixed. There was therefore need of an act to reduce it to certainty. But it was certainly very questionable policy for the legislature to attempt to tamper with the terms of the judges of a court, which the constitution declared should not be "changed" after it was once organized. And where the legislature has taken pains to use clear and explicit language excluding such an intention, I do not feel authorized to disregard their language, and say that the act should apply where they said it should not.

But even if the act could be construed to apply to the terms of the judges of this court, I think it was incompetent for the legislature to enact such a law, on the ground that it would work a change of the court, within the prohibition of the constitution. It is clear that by the provision of the law organizing this court, it would, from the first of June, 1855, to the first Monday of January, 1856, have been composed of the late Chief Justice Whiton, Mr. Justice Smith, and Justice Cole, who was the successor of Justice Crawford. But if the act of 1854 could have the effect of extending the time when the term of Justice Cole commenced, until the first Monday of January, 1856, then the court would, under the operation of that act, have been composed of the same three judges first elected. In other words, this act would have the effect of leaving a judge a member of this court for six months, who would not have remained such under the law by which

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the court was established. Would this be a change of the court within the meaning of the constitution? I think it would. The provision made for changing the judges who constitute a court, seems to me to form one of the essential elements of the character of the court itself. Thus if in respect to a court, the judges of which held their office during good behavior, it should be provided that they should only hold for six years, or *vice versa*, this would certainly be a change, and a material change of the court. Or suppose in this case the legislature conceiving that it would be wiser to have judges stay on the bench a long time, had provided that the terms of office of the successors to the judges first elected, should not commence until ten years after their election? It seems to me clear, that this would have been a change of the court. And this must be conceded unless it is said that a change in the judges who constitute a court, is of so unimportant a character as not to work a change of the court.

And the change here spoken of must not be confounded with that change in the judges which might take place under the operation of the act first organizing it. Such changes might and would take place, but they would not be within the constitutional prohibition, because that instrument contemplated that the act organizing the court should provide for such changes, and that the manner in which they should take place, would give character to the court itself. A change in the court is not a change in the judges, occurring in accordance with the law organizing the court, but it is such a change in the law as necessarily makes the court, at any given time, composed of other judges from what it would have been under the operation of the original act. And it was precisely this latter change which was produced by the act of 1854, if valid.

It was conceded on the argument that if the legislature

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had provided that the terms of the successors of the justices first elected, should not commence until ten years after their election, this would have been a palpable violation of the constitution. But of what provision? I know of none except that which prohibits a change of the court. But if it would be a change of the court to leave a vacuum of ten years between the terms, so that the prior judges could hold over that long, under the clause allowing them to hold till their successors qualify, it would be a change to provide for a similar vacuum of six months. The change might not be so great, but it would be just as much a change. And if a change, it is void under the constitution. And it is no answer to say that the change was reasonable. The legislature was not allowed to make reasonable changes in the court, but was prohibited from changing it at all.

The constitution limits the full term of office to six years, and although it provides that the judges shall hold during the term, and until their successors are elected and qualified, this latter provision furnishes no sanction for legislation extending the time when the succeeding terms should commence, so as to leave a vacuum between them, which would be a part of no term. It is a provision usual in legislation respecting offices, and was obviously designed to provide only for those cases where, by some unforeseen event, the successor is prevented from qualifying. But if it is construed as warranting legislation, putting off the time when succeeding terms shall begin, if it may be put off six months, I see no reason why it may not be put off six years or ten, or as long as the legislature pleases. If the power exists at all, I know of no limit to it but the discretion of the legislature. And so that body might regulate the time during which judges should hold office at their pleasure.

I think it cannot be said that this question has ever been passed upon by this court. It has never been before them

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except as it arose at the successive elections of new judges that have taken place; and then, without any contest whatever, or any thing to induce a very thorough examination of it. At the first election, the act of 1854 was overlooked, and Justice Crawford retired from the bench, and Justice Cole entered upon his duties on the first of June, 1855. At the next election the late Chief Justice was re-elected, and it was of no importance to him whether his new term began in June or January. At the last election it was a subject of conversation among the judges, but as Mr. Justice Smith intended not to occupy the office from June till January, he, in accordance with the opinion of the other two judges, resigned, and I was appointed, though this course was taken partly to save any question that might be made.

I do not consider this kind of action among the judges to amount to a judicial decision. There are certainly reasons why they would not act, under those circumstances, with the same freedom, or the same sense of responsibility, with which they would act in a judicial proceeding. I have, therefore, considered the question as an open one, and have stated my own views in regard to it.

Cole, J. Some of the questions raised by the demurrer to the return made in this case, are the same as were involved in the motion to quash the alternative writ of mandamus in the case of the *State ex rel. Proudfit vs. Hastings*, and as I have fully expressed my views in that case upon them, I need not restate them here. A majority of the court have arrived at the conclusion that chapter 41, Session Laws of 1854, p. 53, concerning the commencement of the terms of judges of the several courts of this State does not apply to the justices of this court. From that conclusion I am constrained to dissent. I have no doubt but that it was intended to apply to the justices of this court, and that it changed the commence-

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ment of the term of office of any justice elected after the law took effect, and made it commence on the first Monday of the year, next after the election of such justice. I can give the law no other rational construction. It reads: "The terms of office of county judges, circuit judges, and justices of the supreme court, shall be for such time as at present prescribed by law, and shall commence on the first Monday of each year next after the election of such officer, unless otherwise specially provided."

It must be admitted that this language is rather ambiguous and indefinite, but is it so much so that we cannot ascertain the intention of the legislature in passing it. It evidently was passed for the purpose of fixing the time for the commencement of the term of certain judicial officers. This is apparent upon the least examination. But to the term of what judicial offices does it relate? The act says that "the term of office of county judges, circuit judges, and *justices of the supreme court*, shall be for such time as at present prescribed by law, and shall commence on the first Monday of each year, next after the election of such officer," &c. The act expressly names the justices of the supreme court as the officers, the commencement of whose term of office was to be regulated by the act. But it is said that the language used in the last clause of the section, namely, "unless otherwise specially provided," shows that the act was not intended to apply to the commencement of the term of office of justice of this court, since the commencement of their term of office is specially prescribed in sec. 3 of the organic act, chap. 395, of the Session Laws of 1852, p. 601. If this bea correct view of that law, the question naturally arises, why were the justices of the supreme court enumerated among the officers, the commencement of whose term of office was to be regulated and fixed by this law? Why were they mentioned in that connection, or at all in this enactment?

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It is said that the legislature seem to have considered it necessary to re-enact generally that the term of all judicial officers should be for such time as was then prescribed by law. This construction certainly leads to the most strange consequences. Is it to be presumed that the legislature would deliberately do so foolish, so idle, so perfectly unmeaning a thing, as to re-enact what was already the law, and say that the term of all judicial offices should be for such time as has been already prescribed by law? This is charging the legislature, which passed this act, with a degree of stupidity which I am unwilling to attribute to them, if I can by any fair rule of interpretation, place a different construction upon the law.

The object of this law undoubtedly was to produce, as far as possible, uniformity in respect to the commencement of the term of office of all the state and judicial officers. The political year, by the constitution, was to commence on the first Monday of January, and that was about the time that the various state and county officers entered upon their term of office. The term of office of the justices of the supreme court commenced in June, while the commencement of the term of office of the judges of the circuit and county courts was generally the first of January. And to produce uniformity in the commencement of the term of all the offices, as well probably as to contribute to the convenience and regularity of auditing quarter yearly salaries, and keeping the accounts in the various departments, this act of the legislature was passed. The evil to be remedied by the law was not very serious, but it is easy to perceive that an inconvenience did exist.

Again, by the same course of reasoning by which it is shown that the act of 1854 did not apply to the commencement of the term of office of justices of the supreme court because the commencement of their term of office was "otherwise specially provided," would also prove that it could not

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apply to the term of circuit and county judges, since the commencement of their term of office was otherwise fixed by law. In the act organizing the old supreme court, it said the "judges shall severally enter upon the duties of their office as soon as elected and qualified." Sec. 3 of the organic act, R. S., 1849, p. 760. This was the provision in regard to the judges elected under that act. By sec. 87, chap. 6, R. S., 1849, it was provided that "the regular term of office of all state and county officers, when elected for a full term, shall commence on the first day of January next succeeding their election." I understand the judges of that court held unanimously, that this provision applied to and fixed the commencement of the term of office of the judges subsequently elected under that act. Whether this was so or not, the organic law and the constitution would determine the commencement and length of the term of office. When the sixth circuit was organized, the law provided that the judge of said circuit should enter upon the duties of his office as soon as elected and qualified, "and shall hold his office for six years from the time he shall enter upon the duties of his said office." Chap. 286, Session Laws, 1850, p. 214. By the law organizing the seventh judicial circuit, the judge of that circuit was to enter upon the duties of his office as soon as elected and qualified, "and shall hold his office for six years from *the time of his election*, and until his successor shall be elected and qualified." Chap. 40, Sess. Laws 1853, p. 40. By the law organizing the eighth circuit, the judge of that circuit was to "enter upon the duties of his office on the first day of January, in the year eighteen hundred and fifty-five, and shall hold his office for the term of six years, and until his successor is elected and qualified." Chap. 13, S. L., 1854, p. 17. Precisely the same provision was made in reference to the commencement of the term of office of the judge of the ninth circuit. Chap. 75, S. L. 1854, p. 94. It will be seen by sec. 1, chap. 86, R. S. 1849, that county

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judges were to hold their office for four years from the first day of January, 1850.

If such controlling effect is to be given to the language, "*unless otherwise specially provided*," as the majority of the court seem to think it must have, I cannot well understand how the law can be held to apply to and fix the commencement of the term of the judges of the circuit and county courts, in view of the provisions of law just cited. I do not think these words should have any such controlling force or effect given to them, but that they are to be considered in connection with the other parts of the section, from all which the intention of the legislature will be manifest. I have no doubt but that intention was to change the commencement of the term of the office of justices of this court, as well as the commencment of the term of the other judges therein mentioned.

It is insisted, however, that the legislature could not change the commencement of the term of office of the justices of the supreme court, because, in effect, that would be to change the court itself, which confessedly it could not do. Assuming that this act changed the commencement of the term of office from the first of June to the first Monday of January thereafter, is it correct to say that this makes a change in the court? The individuals composing this court may change, while the court itself remains unchanged. There has been an entire change in the individuals composing the court since its organization, still it is the same court. In conceding to the legislature the power to change the commencement of the term of office of the justices of the supreme court for a few months, for the purpose of producing regularity and uniformity in the commencement of the terms of the judicial offices of the state, I do not admitt that this power is unlimited. The legislature could not keep in office a judge ten years, as has been supposed, by postponing for that period the commencement of the term of his successor. For the constitu-

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tion limits the term of office to six years, and only permits the incumbent to hold over after the expiration of the term until his successor is chosen and qualified, to prevent a vacancy in the court.

I am therefore of the opinion that my term of office did not commence until the first Monday of January, 1856, and that the relator might have held the office until that time, had he seen proper to have done so.

It is needless for me to add that I was ignorant of the existence of the law of 1854, when I qualified and entered upon the discharge of the duties of a justice of this court. My attention was first called to the law in the latter part of the winter of 1857, at the time of the re-election of the late Chief Justice Whiton. Upon that occasion the proper construction of the law of 1854 was a subject of considerable discussion among the members of this court in the consultation room, and we unanimously took the view of it which I have expressed in this opinion.

It is proper that I should express an opinion upon one other matter set up in the return. It is averred therein that "the relator not wishing to hold, use, or enjoy, said office, or to do, exercise and perform the duties, or to claim, have or enjoy, the rights, privileges, emoluments or salary, during the time aforesaid, did, of his own free will and choice, did leave and abandon the same." The demurrer admits these facts to be true, and if they are as alleged, they show a voluntary surrender of the office, and as a matter of course, a waiver or forfeiture of the salary for the time mentioned in the relation.

These observations are all I deem it necessary to make upon the demurrer.

I think the demurrer must be overruled.

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THE STATE ex rel. PROUDFIT *vs.* HASTINGS, TREASURER, &c.

This was an action commenced by Andrew Proudfit, by information for a mandamus, against Samuel D. Hastings, the State Treasurer, to compel him to pay out of the state treasury to the relator $5645,25. The information set forth that Calkins & Webb were the state printers, and as such they had printed and furnished to the Secretary of State, by his order, blank forms amounting to 5640 quires, worked on both sides. The account for these blanks was presented to the Secretary of State for him to audit, on the 13th of Nov., 1858, duly verified by affidavit; and certified to be correct on the 15th, by the assistant secretary of state. On the same day a warrant was drawn on the treasurer for the amount, and given to Calkins & Webb. All these certificates, and the warrant, were signed by the assistant secretary of state, and not by the secretary himself. These blanks were forms for the use of the assessors and others in assessing and collecting the taxes for that year, and to be sent to the sevral clerks of the boards of supervisors of the counties, and to be used by those officers.

The warrant was then assigned to the relator. On the 15th of July, 1859, he presented the warrant for payment to the treasurer, who refused to pay the same, though there was plenty of unappropriated moneys for that purpose in his hands, and still refused. Therefore this action was brought. After the service of the alternative writ, the respondent moved to quash the writ, and assigned for cause that the petition did not state facts sufficient to entitle the relator to the writ.

C. Abbott, for the respondent, made the following points:

1. The Secretary of State had no authority in law to order or request the printing of the blanks in the writ named, or contract in any way for the printing of the same, so as to bind the state. 2. It does not appear that the account or claim was ever audited by the Secretary of State. 3. The warrant was not countersigned by the comptroller of the state, as required by section 5, of the act establishing that office.

George B. Smith and *S. Crawford*, for the relator.

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By the Court, DIXON, C. J. The opinion of this court upon the constitutionality of the act of May 17th, 1858, providing for the appointment, and prescribing the duties of the State Comptroller, the power of the assistant secretary of state to act as auditor, and the scope and extent of the authority of the secretary himself, when acting in that capacity, three of the questions involved in the present motion, will be found discussed in the case of the *State on the relation of Crawford against this same Defendant, supra*, 525. By a reference to that opinion, it will be seen that the first question was, by a majority of the court, resolved in favor of the relator, the second against him, and the third in his favor, provided it is determined that provision had been made by law for the payment of the claim in question, leaving nothing to be done but for the secretary to assertain and adjust its amount.

The only question, therefore, left for our consideration here, is whether there was such provision for the payment of the demand in controversy, or, in other words, whether any appropriation therefor has ever been made. This question depends entirely upon the construction to be given to section 15, of chapter 115 of the Laws of 1858. If by that section the legislature authorized the Secretary of State to contract for, and procure the printing of the forms charged in the account, then I apprehend there could be but little doubt of the liability of the state, and the secretary's certificate of the amount of an indebtedness thus lawfully incurred, and which he was empowered to audit, would be a sufficient authority to the treasurer for its payment. If, on the other hand, the secretary was not authorized to contract for the printing of such forms then, according to the principles laid down in the opinion referred to, his certificate of allowance would have been no justification for a payment by the treasurer, for the reason that it would have been an unauthorized act, not

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binding upon the state or any of its officers. He is only authorized to audit, and the treasurer to pay, in cases where appropriations have been made by law for that purpose; and, as in this case, it is not pretended that there has been any direct or specific appropriation, the decision must turn upon the power of the secretary to make the contract.

It is clear to us that the secretary had no such power; and this, we think, will be sufficiently obvious by a reading of the section itself, which is as follows: "It shall be the duty of the Secretary of State to prepare, and cause to be printed, the necessary forms to carry into effect the provisions of this act, and to transmit copies of such forms to the clerk of the board of supervisors of each of the counties in this state, immediately on the publication of this act; and it shall be the duty of each of said clerks to cause to be printed, for the use of the assessors of the several townships in his county, such number of said blank forms as may be necessary." The intention of the legislature is so manifest from this language, that it is almost useless, by reasoning, to attempt to make it plainer. It was that the secretary prepare a proper form, and that he should procure so many of them to be printed and distributed among the clerks of the several boards of county supervisors as would be necessary to serve as copies, from which they might cause a sufficient number to be printed to supply the assessors of the several townships of their several counties respectively. The authority thus confered was not general and unrestricted, but was limited by the object to be attained, which was to furnish copies from which the forms themselves might be printed at the expense of each county. The intention was not to furnish all necessary blanks at the cost of the state, but copies after which each county might, at its own proper charge, provide itself.

Whilst it may be admitted that the secretary was endowed with a certain discretion as to the number of copies with

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which he might furnish each clerk, still he was limited to such as might reasonably be required, under the circumstances, to ensure the accomplishment of the purposes in view, one copy might answer, but prudence and safety might demand that more be sent; and so long as he acted within the bounds of reason, his conduct could not be assailed. But to say that, under it, he might print, distribute, and charge the state with the payment of the price of 135,000 and upwards, for the purpose of supplying 52 counties with copies, is too preposterous to be listened to for a moment. The act conferred no such authority, and the legislature never intended it. The treasurer, consequently, was, for this further reason, right in refusing payment, and the motion on that ground must be sustained.

It is urged that the secretary was justified in this extraordinary stretch of power, because there was not sufficient time between the passage and publication of the act, and the time when, according to law, the blanks should have been in the hands of the several town assessors, for the clerks of the several counties to procure and distribute them. This is clearly no excuse. It is not for the secretary, or any other officer, to cure defects, or omissions, in the legislation of the state. This power is vested in the legislature alone.

The motion to quash the alternative writ of mandamus, issued in this case, is, therefore, sustained, with costs.

Cole, J. I deem it necessary and proper to file an opinion in this case, for the purpose of stating briefly the grounds upon which I think the motion to quash the alternative writ of mandamus must be sustained. The members of the court are unanimous in the opinion, that the motion to quash must prevail; but not agreeing upon all the points relied on in the motion to quash, we sustain it upon somewhat different

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grounds. Some of the questions involved are of sufficient practical importance to justify each member of the court in expressing his views upon them.

The motion to quash is for the following reasons: 1st. The Secretary of State had no authority in law to order or request the printing of said blank forms in said writ named, or to contract in any way for the printing of the same, so as to bind the state. 2d. It does not appear that said account or claim was ever audited by the Secretary of State. 3d. That said warrant, in said writ named, was not countersigned by the comptroller of the state, as required by section 5, chapter 155, of the Laws of 1858. 4th. For other defects appearing on the face of the said petition.

The application is for a mandamus, to compel the respondent, the treasurer of the state, to pay a claim, amounting to $5,640 25, for printing 5,640 quires of blank assessment forms, ordered, as is alleged by the Secretary of State, of the state printer, for the use of the various counties of the state. The account was audited by the assistant secretary of state, and assigned by the state printer to the relator, who insists that the treasurer should pay it. This claim the respondent has refused to pay, and, as we think, very properly, for several reasons.

In the first place, we are all clearly of the opinion, that the Secretary of State had no legal authority to order this amount of blanks to be printed, and as a matter of course, could not bind the state by his action in that behalf. A public agent cannot bind the government unless acting within the scope of his authority; and there is no hardship in requiring from private persons dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the government. This rule is well settled by the authorities, and is founded in reason and necessity, to guard the public against losses and injuries arising from the

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fraud or mistake, or rashness and indiscretion of public agents. Story on Agency, section 307; *Lee vs. Munson*, 7 Cranch, 366. Now, section 15, chapter 115, Session Laws, 1858, makes it the duty of the Secretary of State to prepare and cause to be printed the necessary forms to carry into effect the provisions of the assessment law, and to transmit copies of such forms to the clerk of the board of supervisors of each county in the state, immediately after the act was published; and it was further made the duty of each of the said clerks to cause to be printed, for the use of the assessors of the several townships in his county, such number of blank forms as might be neeessary. This is a very clear and distinct provision of law prescribing what the Secretary of State should do in regard to the blank forms mentioned in the relation. It does not authorize him to cause to be printed blank forms for the use of the various counties of the state, but quite the contrary. He is only authorized to have a few forms printed, so that he can furnish the clerk of each of the county boards of supervisors with a copy; and the clerk is the officer whose duty it is to have the necessary forms printed for the use of his county. The object of this provision of law is very manifest. In order to secure accuracy and uniformity in the blank forms, the Secretary of State was to prepare one. He was then required to have the form printed, and furnish the clerk of each of the county board of supervisors with a copy. Evidently all the secretary required, and all he was authorized to have printed, in order to carry out the act of the legislature, and discharge the duty imposed upon him, was a few hundred printed forms. Instead of ordering that amount struck off, he caused to be printed a hundred and thirty or forty thousand. This conduct of his was wholly unauthorized, and it is difficult to believe that the state printers did not know the secretary had no power whatever to have such a quantity of printed forms struck off. At all events, they

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were bound to know the extent of his authority in the premises, and to take notice that he could not bind the state by any such order. It is insisted that the Secretary of State was authorized to order from the state printer such printing as might be necessary and convenient for his department. Undoubtedly he was; but the printing ordered in the present case was not necessary for his department, and could not be used in his department. The blank forms were indubitably designed for the use of the various counties in the state, and as already remarked, the secretary had no authority to have forms furnished for that purpose. I am therefore of opinion that the relation shows no cause entitling the relator to a peremptory writ, and that the first ground assigned in the motion to quash the writ is sound and well taken.

And here, perhaps, the discussion in this case might properly end; but as my brethren think we ought to express our views upon the other grounds assigned in the motion, I proceed to briefly notice them.

It is objected that it does not appear from the relation that the account was ever audited by the Secretary of State. Assuming the account to be a proper one against the state, and one which the state is liable to pay, still it is contended that the respondent was not authorized to pay it until it was audited. The argument is this. The relation shows that the account was audited and allowed by the assistant secretary of state, but the constitution, section 2, article 6, makes the secretary himself auditor, and the duties of an auditor, it is insisted, are personal, and, like the duties of a judicial officer, must be performed by the officer in person. I am not able to admit the soundness of this position. I grant that the constitution declares that the Secretary of State "shall be *ex officio* auditor." But what is an auditor? Webster's definition is: "A person appointed and authorized to examine an account or accounts, compare the charges with

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the vouchers, examine the parties and witnesses, allow or reject charges, and state the balance." Johnson gives this definition, "A king's officer, who yearly examining the accounts of all under officers accountable, makes up a general book." "An officer whose duty is to examine the accounts of officers who have received and disbursed public moneys by lawful authority." 1 Bour. Law Dic., 152. "An officer or person whose business is to examine and verify the accounts of persons entrusted with moneys." "In American law, an officer of the treasury of the United States, whose duty is to examine the accounts of officers who have received and disbursed public moneys by lawful authority. 1 Burrill L. Dic., 116. "Auditor, in the language of the ancient law: an officer of the courts, whose duty it was to interrogate the parties. In a narrower sense, an officer who overlooks accounts." 1 Encyclopædia Americana, p. 463. "Auditor in English law, is an officer of the Queen, or some other great person, who, by examining yearly the accounts of the under officers, makes up a general book, which shows the difference between their receipts and charges, and their several allowances." 4 Encyclopædia Britanica, p. 236.

The legislature had a very clear and just understanding of the import of the term "auditor," when they prescribed the powers and duties of the Secretary of State acting as auditor. It was made his duty "to superintend the fiscal concerns of the state, and to manage the same in the manner required by law; "to keep, fair, clear, distinct and separate accounts of all the resources, funds and incomes of the state; and also of all expenditures, disbursements and investments thereof, showing the particulars of every expenditure, disbursement and investment;" "to carefully examine, quarter yearly, the books and accounts of the Treasurer, and the moneys on hand in the treasury, and immediately thereupon report the result of such examination in writing, to the Governor, specifying therein

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the amount and kinds of funds particularly;" "to keep and state all accounts between this state and the United States, and all other accounts in which the state is interested;" to examine and settle the accounts of all persons indebted to the state, and to certify the amount or balance to the treasurer;" "to direct and superintend the collection of all moneys due the state;" "to examine and determine the claims of all persons against the state, in cases when provision for the payment thereof shall have been made by law, and certify the same to the State Treasurer," &c. Section 19, chap. 9, R. S., 1849; sec. 27, chap. 10, R. S., 1859.

These are some of the duties of auditor as prescribed by the legislature, and, although multifarious and important, I see no one among them implying such personal trust and confidence in the auditor, or demanding such peculiar fitness and qualification in the person discharging it, as to say that it can only be performed by the secretary in person. The duties of the officer are not analogous to the duties of a judge or member of the legislature, which must be discharged in person by the incumbent; neither can I believe that the framers of the constitution contemplated they would all be performed by the secretary in person. It was undoubtedly expected that the secretary by himself and assistants would perform these various duties, and that the secretary would exercise a general control over all matters of this nature transacted in his department. But the secretary could not do every thing in person. And if it be asserted that the secretary must audit and allow all claims against the state, why is it not equally necessary that he should keep the books, state the accounts, and do and perform all other matters and things which an auditor by law is required to do? The Secretary of State is expressly authorized by law to appoint an assistant, who is required to take the oath of office prescribed by the constitution, and to give a bond for the faithful performance of his duties.

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And, it is declared, that "such assistant may perform and execute all the duties of Secretary of State, except as commissioner of school and university lands, and as member of the board of regents. It is clear, from this language, that the legislature intended to confer upon the assistant secretary of state power to audit and allow accounts in the same manner and to the same extent as the secretary himself might do; and I have no doubt but it was competent for the legislature to clothe the assistant with that authority. So that, if I considered the claim set forth in the relation a just one against he state, I should be compelled to hold that it had been properly audited.

The third ground relied on in the motion to quash is, that the warrant in the writ named was not countersigned by the comptroller of the state, as required by sec. 5, chap. 155 of the Session Laws of 1858. That section provides that the comptroller should countersign all warrants drawn by the Secretary of State upon the State Treasurer, which shall be authorized by law, and no warrant shall be paid by the State Treasurer unless the same shall be countersigned by the comptroller, and the act or parts of act authorizing the payment of such warrant, be particularly stated in such warrant. The warrant not being countersigned by the comptroller, I consider a good and sufficient reason why the treasurer should not pay it. It is said however, in answer to this objection, that chap. 155 is unconstitutional, and therefore that the condition therein imposed that the treasurer should pay no warrant unless the same were countersigned by the comptroller, is null and void. And to show that this law is unconstitutional, it is said that the legislature has therein attempted to deprive the Secretary of State of his constitutional power and authority as auditor, and to devolve that duty upon the comptroller. I do not so understand the law and the constitution. I have already referred to the clause in the constitu-

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tion which declares that the Secretary of State "shall be *ex officio* auditor." Does the law creating the office of comptroller attempt to deprive the Secretary of State of his power, duty, or authority, as auditor? I think not. The second section of the act in defining the duties of the comptroller, says that he shall examine and pass upon all claims and *accounts audited by the Secretary of State*, and if he shall find the same properly verified or proved, and authorized by law to be audited, he shall certify that fact upon such claim or account. The third section provides that "all claims and accounts against the state, authorized by law to be audited, shall be audited by the Secretary of State as required by law. The order of the Secretary of State, auditing any claim or account, shall be endorsed on or annexed to such claim or account, and shall state particularly the acts or parts of acts which authorizes such claim and confers the power to audit the same, and, together with such claim and all evidence relating thereto, shall be delivered to the comptroller for his examination, and shall thereafter remain on file in his office.

There is nothing in these provisions which will warrant the presumption that the legislature intended to deprive the Secretary of State of his power and authority as auditor, but the language used would lead to the contrary conclusion. For in most clear and unambiguous terms the act declares that all claims and accounts against the state, authorized by law to be audited, shall be audited by the Secretary of State; thus, not only recognizing the constitutional right or power of the secretary to audit accounts, but even attempting to enact or confer that power upon him by this very law. But it is objected that because it was made the duty of the comptroller to examine and pass upon the accounts audited by the secretary, that this is intrenching upon the power of that officer, and an effort to transfer by an indirect legislation the auditing power, to the comptroller. I do not think this was the object or pur-

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pose of the act. The law was passed undoubtedly to throw additional restraints and safeguards around the public treasury. It requires that before a person should be entitled to draw money from the state treasury upon a claim audited by the secretary, that such claim shall be submitted to another officer and certified to be correct. Is it not competent for the legislature to make such provisions to protect the public moneys, and to establish as many conditions precedent to drawing money from the treasury, as may be deemed necessary? I do not understand that because a person has a claim audited by the Secretary of State, that he has a constitutional right to go to the treasury and obtain the money upon it. The public moneys are under the control of the legislature, which may impose such conditions upon drawing it from the treasury as may be deemed proper. Suppose the legislature should provide that no money should be paid upon a claim audited by the Secretary of State, until the same had been referred to the Attorney General and certified to be correct, would such an enactment be unconstitutional? Or suppose it was required to be referred to the Governor for his examination and certificate, before the treasurer was authorized to pay it? Such restrictions might be very salutary and necessary to prevent frauds and mistakes in the disbursements of the public funds. Considering the many important duties which the secretary is called upon to perform, his proper duties as secretary of State, as auditor, and commissioner of the school and university lands, and it might be absolutely impossible for him to bestow that labor and examination upon a difficult claim, necessary to ascertain the just amount due upon it. And the legislature might well provide for referring such claims to the law officer of the state, or to an officer specially appointed for that purpose, after they had been audited by the secretary. Cannot the legislature guard the public interests, and protect the public treasury against the consequences of fraud, accident

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or mistake, by throwing around it such safeguards as may seem wise and proper? I have no doubt of it, and such, I think, was the design of the law. It might have been a piece of misjudged or unwise legislation. But that does not affect the question of power which we have been considering.

It was also contended upon the argument in behalf of the relator, that the conduct of the respondent, in refusing to pay the amount mentioned in the relation, was extraordinary and unjustifiable; and it was insisted that when a claim was once audited by the Secretary of State, this action of his was final and conclusive upon the rights of the State, and that the Treasurer must proceed to pay it without question, when presented to him. The fault that the Secretary has audited an unjust or unfounded claim against the state, does not render such claim valid, and the Treasurer would be derelect in duty if he did not refuse to pay a claim of that character, though audited, when he knew that it was not legal and just

For these reasons, I think the motion to quash the alternative writ should be sustained.

NOTE.—The statements referred to by the judges, as being on file before the several opinions above given were written, were filed on the 20th of August, 1859, at the time of overruling the demurrers. In Crawford's case the court held:

1. The act of the legislature, approved May 17, 1858, entitled, "An act providing for the appointment of a comptroller, and prescribing his duties," incorporated into chapter 10 of the Revised Statutes of 1858, as chapter 155 of acts of a general nature of 1858, which created the office of comptroller, and authorizes him to "examine and pass upon all claims and accounts audited by the Secretary of State, is unconstitutional and void. COLE, J., dissenting.

2. Chapter 41, of the General Laws of 1856, entitled "An act concerning the terms of office of judges of the several courts of this state," which provided that the terms of office of county and circuit judges, and justices of the supreme court, should commence on the first Monday of each year next after the election of such officers, was constitutional. Therefore, the relator was entitled to hold and exercise the duties of the office of associate justice of the supreme court, from the first day of June, 1855, until the first day of January,

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1856, under the provisions of the constitution, that such justice shall hold his office until his successor is elected and qualified. PAINE, J., dissenting.

3. A public officer who voluntarily surrenders his office to another claiming title thereto, under color of right and suffers such other person to discharge the duties and receive the salary provided by law therefor, in such a manner as to become an officer *de facto*, thereby waives and forfeits his right to demand or receive the salary so provided and appropriated. The return in this respect is good, and therefore the respondent properly refused to pay the draft of the Secretary of State, drawn on him for such salary.

In Proudfit's case, the court held:

1. Section 15 of chapter 115 of the General Laws of 1856, relating to the assessment and collection of taxes, incorporated into chapter 18 of the Revised Statutes of 1858, made it the duty of the Secretary of State, immediately after the publication of the act, to prepare, and cause to be printed, the necessary *forms* to carry into effect the provisions of the act, and to transmit copies of such forms to the clerk of the board of supervisors of each of the counties in in this state; and made it the duty of each of said clerks, to cause to be printed, for the use of the assessors of the several townships in his county, such number of said blank forms as might be necessary. Under this section the Secretary of State ordered the state printer to print and furnish 5640 quires of double work, making by the computation about 185,360 blanks. The printer furnished them to the secretary, by whom they were distributed through the several counties pursuant to the act. The account of the printer, amounting to $5640,25, was audited and allowed by the assistant secretary, who drew a draft, or order for the amount, upon the State Treasurer. The treasurer, on presentation of the draft, refused to pay the same. On a motion to quash the alternative writ in a proceeding by mandamus to compel the treasurer to pay the draft, by the petition for which these facts appeared: Held, that the court would take judicial notice of the number of counties in the state; that the action of the secretary in procuring such a quantity of *forms* was wholly unauthorized, and that the treasurer properly refused payment of the draft.

2. The state is not bound by the acts of its agents or officers, unless it manifestly appears that they are acting within the scope of their authority.

3. Section 2, of Article VI. of the constitution, makes the Secretary of State *ex officio* auditor, and reposes in him a personal trust and confidence, which cannot be delegated to, or exercised by another. The account, in this instance was audited and allowed, and the draft drawn by an assistant secretary of state, the allowance and draft are, therefore, void. COLE, J., dissenting.

4. The act of the legislature, approved May 17th, 1858, entitled, "An act providing for the appointment of a comptroller, and prescribing his duties," in-

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corporated into chapter 10 of the Revised Statutes of 1858, as chapter 155 of Acts of a General Nature of 1858, which creates the office of comptroller, and authorizes him to "examine and pass upon all claims and accounts audited by the Secretary of State," is unconstitutional and void. COLE, J., dissenting.

FALKNER *vs.* GUILD.

APPEAL FROM CIRCUIT COURT, DANE COUNTY.

Heard August 2, 1859.] [Decided February 7, 1860.

Jurisdiction—Partition—Publication—Taxes—Title, Failure of.

Where a party contracted for the purchase of real estate, and paid a part of the purchase money, the vendor agreeing to convey by "a warranty deed," upon the payment of the whole; but afterwards the vendee discovered that the vendor had not a perfect title, and so refused to pay the balance of the purchase money and brought an action to recover the amount paid: Held, that the action may be maintained; and the vendee was not obliged to demand or accept a deed which would not convey to him a perfect title to the land.

Where lands were sold upon an execution in a partition suit; and in an action involving the validity of the sale it appeared that the court did not render the preliminary judgment required by law, but did appoint commissioners, and receive and confirm their report, and enter final judgment: Held, that though the want of the preliminary judgment was an irregularity, and sufficient cause for reversing the final judgment on a direct proceeding for that purpose; yet it does not make the judgment void, so that it can be impeached collaterally.

Where proceedings are in a court of general jurisdiction, and jurisdiction appears by the record, even though it does not show everything necessary to regularity, yet it will be presumed, unless the contrary expressly appear; and even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. This rule applies as well to proceedings under special statutes as under the common law.

The act of partition required that a copy of the petition should be served *at least forty days* before the term at which it should be presented, on all the parties not joining in the petition, with a notice that an application would be made on

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a day certain in term time; and in proceedings under this act, the notice stated that an application would be made to the judge for the appointment of commissioners to make the partition; but stated no time when, nor where, the application would be made; and therefore fails to comply with the requirements of the statute; and the notice and petition were filed in less than forty days after service, and the commissioners appointed: Held, that such a notice did not confer such jurisdiction over the parties, as would enable the court to enter a personal judgment against the defendants.

Where the act required the absent defendants to be brought into court by publication, and publication being commenced in a newspaper, and being continued for a part of the time required, the newspaper was discontinued, and the notice was then posted on the court house door for the balance of the time: Held, that such publication was not a compliance with the statute, and did not give the court jurisdiction of the absent defendants.

Where a party contracted for the purchase of real estate, and paid part of the purchase money; and brought his action to recover back the money paid, because the vendor had not title to the land sold: Held, that it was error in the court below to refuse to allow the defendant to give in evidence the tax deeds for the same land, made to himself, for the purpose of showing title in himself.

This was an action commenced by James P. Falkner against Loring Guild to recover back money paid upon a land contract, on the ground of the defendant's want of title to the land. The complaint was framed upon the following paper:

MADISON, Wisconsin, July 28, 1855.

SIR:—You have this day purchased from me lots one and two, in block No. 1, of Guild's Addition to Madison, at the price of two thousand and one hundred dollars, of which I acknowledge the receipt of one-third, $700. The remaining two-thirds to be paid by equal annual instalments of $700 each, to wit: On the twenty-eighth days of July, 1856 and 1857, with interest at 10 per cent., interest to be paid annually. I shall grant you a valid warranty deed of the above lots, on the 1st day of March, 1856, and deliver you an abstract of title. You are then to execute a bond and mortgage in the usual form for the balance remaining unpaid. You are to have the privilege to so execute the bond and mortgage as to give you the privilege of paying up the balance of principal and interest at any time thereafter before the expiration of the above mentioned time. You are then to have your bond and mortgage discharged. Yours, very respectfully,

L. GUILD.

To Mr. JAS. P. FALKNER, Madison, Wis.

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The answer denied that he had failed to fulfil the contract on his part, and asserted title in himself. Upon the trial the plaintiff read the deed of the executors of T. Haight to the defendant for lots one and two of the S. E. fractional quarter of section 15, town 7, range 9, containing 68.98 acres, dated March 20, 1855; also a deed to Haight from the sheriff of Dane county for 12 acres of the fractional quarter section, also for 25 acres undivided in the same; also the judgment on which the execution had issued, and upon which the sale by the sheriff had taken place. This record consisted of the notice, which, after the title of the case, proceeded: "Take notice that application will be made to Honorable Charles Dunn, judge of the district court for the county of Iowa and Territory of Wisconsin, for the appointment of commissioners to make partition of the premises held in common by John T. Haight, Rufus Parks, Francis Hedding, Stephen Peck, Solomon Juneau, and others." This was signed by Haight, and dated at Mineral Point, January 19. This was accompanied by the petition, setting forth that Haight owned one-third of the whole tract, Parks had 12 acres, Hedding 2 acres, Peck 1 98.100 acres, and the remainder to unknown owners; and asked for a partition. Service of this notice and partition was accepted by Solomon Juneau, Parks and Hedding, and Hiram Farnsworth, on the 2d of April, 1838. On the 20th of April, 1838, the affidavit of William H. Banks was filed, and set forth: "That the notice and petition of John T. Haight was published in each number of the *Miners' Free Press*, from the 19th day of January, 1838, till the discontinuance of that paper, after which time it was posted on the door of the court house, in Mineral Point, until the 20th day of April, being for the space of three months, the time prescribed by law." Upon this affidavit the court ordered, as appears by the plaintiff's record, as follows: "It is ordered by the court that the said parties interested in the premises who are known, also such as are unknown, or whose interest or share is unknown, appear and show title to the proportions which they may claim of the premises set forth in the said petition, and to answer the said petition on or before the first day of the September term, 1838. It is further ordered by the court that publication of the above order be made in the *Iowa News*, a public newspaper printed in the county of Du Buque, in the Territory of Wisconsin, for six weeks successively, once, at least, in every week, and

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that this cause be continued until the next term of this court."

By the defendant's record this order reads thus: "*This day came the said petitioner, by William H. Banks, his attorney, and it having been proven, to the satisfaction of the court, by affidavit of William H. Banks, that copies of the petition and notice herein had been duly served and published according to law,* it is is ordered by the court that," &c., as in the plaintiff's record.

On the 19th of September, 1838, the court appointed David W. Jones, Amzi Comfort, and Francis J. Dunn, as commissioners to make partition of the lands, and to report at the next term. These commissioners qualified, and reported on the ninth of April, 1839, on the 2d day of the term, assigning the several parts to each one of the parties named in the partition suit, and to Juneau and the unknown owners, the remainder of the ground, 30 acres, undivided among them. The report as given in the plaintiff's record is as follows:

"This day came into court, Francis J. Dunn, and Amzi W. Comfort, two of the commissioners appointed to make partition of the lands in the said petition mentioned, and returned into court their report in writing, made and executed in due form of law, partitioning the said lands among the parties aforesaid, according to their respective rights and interests therein, quantity and quality considered, which report so returned being examined by the court, and found to be correct, is ordered to be confirmed. Wherefore it is considered by the court that the said partition so made as aforesaid, be firm and effectual forever, and it is further considered by the court that the commissioners be allowed the sum of thirty dollars each, for their services aforesaid, to be paid by the petitioner and the defendants, according to their respective interest, and taxed in the bill of costs, and that the said John T. Haight, do have and recover of the said Rufus Parks, Francis W. Hedding, Stephen Peck, and Solomon Juneau, their proportionate share of the costs and charges by him in this behalf expended, and that he may have execution therefor." The record of the defendant omitted from this order all before "Wherefore is considered," &c., on the 29th of June, 1840, the execution was sued out against Parks for the costs, and directed to the sheriff of Dane County, who levied on the 12 acres assigned to Parks, and sold the same to Haight on the 12th of September, 1840. Another execution was also sued

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out against Solomon Juneau, and the unknown owners, which was also levied by the same sheriff upon the 25 acres undivided in the lands, and also bid off by Haight. There was also an execution issued against Peck, but nothing appears to have been done with it. The plaintiff claimed that he had shown the title of the defendant to the land in question, of which the lots constituted a part, was through this record; that the defendant had built a house near the lots sold, and lived in it claiming to be the owner. That he had platted out the whole tract into lots, as an addition to Madison.

The defendant then read a deed from John Hodgson to himself for an undivided half; also a deed from Stephen Peck to Hodgson for ten acres; a deed from Hodgson to Juneau for five acres; a deed from Juneau to A. A. Bird for five acres; a deed from Bird to Wm. D. Bird for five acres, and from Bird to the defendant for five acres. The defendant also offered a tax deed from the state, dated April 15, 1850, for the whole tract, except three acres undivided. This deed was rejected by the court.

The defendant then gave in evidence a certified copy of said judgment and proceedings in the said partition suit, a copy of which differed from that of the plaintiff as above stated. And the defendant's counsel insisted that the record of the proceedings in the partition suit showed, that that court had jurisdiction of the subject matter and the parties thereto, and that the record was conclusive, and that the judgment could not be inquired into collaterally, and requested the circuit judge to charge the jury, that the judgment was final and conclusive, and that if they found that the defendant derived his title to said premises under said judgment, it was good and valid. Which request the said circuit judge refused to grant, and then and there decided and charged the jury that said judgment record showed that the judgment was invalid, and that the judgment of partition was void.

The defendant further insisted and requested the court to charge the jury that if they found that the defendant owned "five acres undivided" in said tract, he had a right to locate the same, and having located it, that he would have good title to such quantity absolutely, and could convey a good title to the land so selected, and that if the jury should find from the evidence that the defendant had selected and taken exclusive possession of the part or lots he agreed to convey to the plaintiff, then the plaintiff could not recover, which

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the judge refused to change, and decided that such was not the law.

The defendant further requested the court to charge the jury that if they found that the defendant owned an interest in such section, equal to the quantity he agreed to convey to the plaintiff, although it was undivided, yet if he should sell and convey the same by warranty deed, a court of equity, in the action of partition would, to protect the defendant from his covenants in such deed, decree said lots to the defendant, and if the jury should find that the defendant's interest in said section was equal to the quantity and value of these lots contracted to be sold to the plaintiff, the plaintiff could not recover, which the court refused to charge, and decided that such was not the law.

And the circuit judge did then and there declare and deliver his opinion to the jury, that the agreement required the defendant to execute a deed that would vest in the plaintiff a good and perfect title to said lots.

"This action is brought to recover back money paid upon a contract between the parties for the sale and conveyance of certain real estate.

"By the terms of the contract, a copy of which is set forth in the complaint, the defendant agreed to give to the plaintiff a *valid warranty deed* of the premises on the first day of March, 1856, and at the same time deliver to him an abstract of title.

"The contract itself acknowledges the payment of $700, part of the consideration money therein mentioned on the day of its date, July 28, 1855.

"The plaintiff bases his claim to recover in this action upon the allegations that at the date of the contract the defendant was not, nor on the first day of March thereafter, was he, nor at any time subsequent thereto, has he been the owner, in fee or otherwise, of the premises mentioned in the contract, and in consequence thereof he conld not, and did not, deliver a valid warranty deed of the same to the plaintiff on the first day of March, 1856, as he was bound to do by the terms of his said contract, nor at any other time, but wholly made default.

"I charge you, as a matter of law, that by the terms of the contract the defendant was bound to give to the plaintiff a good title in fee simple to the premises, free and clear of incumbrance, and that the plaintiff was bound to receive

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no other, and if you believe from the evidence that the defendant, on the first day of March, 1856, or at some time thereafter, and before the commencement of this suit, had not a good title in fee simple to the entirety of the premises mentioned in the contract, so that he could convey the same in fee simple to the plaintiff, then the plaintiff had a right to rescind the contract, and bring his suit against the defendant to recover back the money paid upon it. That before bringing his action it was not necessary for the plaintiff to demand a deed, or give any notice to the defendant. The bringing of the suit operated as a rescinding of the contract on his part, and he is entitled to recover the amount of consideration money paid, with interest from the time of payment, July 28, 1855, to this date.

"The plaintiff in this complaint having based his right to recover upon the failure of defendant's title has been confined in his proofs to such failure, and has not been permitted to give proof of incumbrances upon the premises, and it will be sufficient to defeat this action, if it appears that the defendant had a legal title in fee simple to the premises on the first day of March, 1856, or at any time thereafter, and before the commencement of this suit, so that it was in his power to comply with his contract. Such title, however, must have been a legal, and not merely an equitable title.

"I charge you, also, as matter of law, that the records introduced in evidence of the proceedings in partition in the territorial court of Iowa county, show upon their face that the court never had jurisdiction of the parties, and that they were absolutely void, and no title inures to the defendant through those proceedings. It is very doubtful whether the court got jurisdiction of any of the parties in that proceedings, but in as much as they did not get jurisdiction of all, and no valid decree could be made without acquiring jurisdiction over all, the whole proceedings were void.

The circuit judge further charged the jury as follows:

"GENTLEMEN OF THE JURY: If you believe from the evidence, that at the time of making the contract, or at any time thereafter, during the progress of the negotiation about the title, the defendant claimed to trace his title to the premises through those proceedings in partition, the fact that those proceedings are void, throws such suspicion upon the defendant's title as to throw the burden of proof upon him to exhibit and establish his title; and then, and in that case,

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the plaintiff is entitled to recover in this action, unless you are satisfied from the evidence that he has established the fact that he was, on the 1st day of March, 1856, or at some time thereafter, and before the commencement of this suit, the owner in fee simple of the entirety of the lots mentioned in the contract, and had good and lawful right to convey the same."

The jury found for the plaintiff, and judgment was entered accordingly; from which the defendant appealed.

Hopkins & Firmin, for the appellant.

J. T. Clark, for the respondent.

By the Court, PAINE, J. The appellant agreed to convey to the respondent, by a "a valid warranty deed," on the first day of March, 1856, certain lots. The respondent paid $700, part of the contract price, at the making of the contract. The conveyance was not made, and this action was brought to recover back the money paid, the respondent alleging that at the time appointed for the conveyance, the appellant had no title to the lots, and taking upon himself the burden of establishing that fact.

We have no doubt of his right to maintain the action, if he could establish it. We do not think he was bound to demand and accept a deed which would not be a compliance with the contract. If the appellant had tendered a warranty deed, having no title, the respondent would not have been bound to receive it, but could have recovered back the money paid. And we think his right is the same, without going through the ceremony of a demand, if he will show that the appellant had no title, and could not have complied with the contract.

But the principal question is as to the effect to be given to the record in the partition suit, which was introduced in evidence by both parties, and on which, as appears by the appellant's affidavit, he chiefly relies to support his title. The re-

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spondent offered evidence to show that the appellant claimed title through these proceedings, and then offered the record to show a want of title, claiming that it appears on the face of the record that the proceedings were void. The appellant claimed that it supported his title, but the circuit court ruled otherwise, and held the proceedings void.

Two objections are taken to their validity; *first*, that the records show a want of jurisdiction over the parties; and *second*, that there was no judgment to sustain the sale of the interest allotted to Parks, one of the defendants, which interest was sold on an execution against him for his share of the costs of the proceedings, and through which sale a part of the title of the appellant is derived.

We think the last objection cannot be sustained. The proceedings were had under the partition act of Michigan, Laws of 1833, p. 269, which was then in force in this territory. After acquiring jurisdiction of the parties, and taking the proofs, the court was required to render a preliminary judgment, settling their various rights in the premises, and then to appoint commissioners to make partition accordingly. The latter were to report the manner of making partition, and then, on the confirmation of the report, the court was to render a final judgment, "that the partition be firm and effectual forever," and was authorized to give judgment for the costs. In the record here presented, no preliminary judgment, settling the rights of the parties, appears to have been made. But the commissioners were appointed, their report made and confirmed, and a final judgment rendered, that "the partition so made be firm and effectual forever," and for costs, &c. The want of the preliminary judgment was doubtless an irregularity, and may have been sufficient cause for reversing the judgment, on a direct proceeding for that purpose. But we do not think its absence makes the final judgment that was rendered, void, so that it can be impeached collaterally.

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This final judgment has all the essentials of a judgment, and may stand by itself. It necessarily asserts that the rights of the parties were as they were allotted by the commissioners. And if the court had jurisdiction of the parties, we think it cannot be avoided collaterally.

The proceedings were in a court of general jurisdiction; and the general rule in respect to such courts is, at all events where jurisdiction appears, that though the record does not show everything necessary to regularity, it is to be presumed, unless the contrary expressly appears. And even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. It is true that proceedings under special statutes have sometimes been made an exception to this general rule as to presumption, even in courts of general jurisdiction. But without entering the inextricable labyrinth of cases on the subject, we will only say that we can see, upon principle, no reason for the distinction. The general presumption in favor of the regularity of the proceeding of such courts, is founded on the character of the court itself. And that character is the same, whether it act under a special statute, or under the common law. I cannot see that a difference in the source of its authority to act, can make any rational distinction as to the presumption in favor of the regularity of its action. And if not, even though the preliminary judgment required by the statute under which these proceedings were had, should be held necessary as a foundation for the final judgment, yet the preliminary judgment may be presumed to have been rendered, though it does not appear, from the fact that the court did render the final judgment.

But we think the other objection to this record is fatal; that is, that it shows on its face that the court acquired no jurisdiction over the parties. There are some modern cases which manifest a disposition to hold proceedings with respect

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to lands, such as partition, sales by administrators, &c., to be proceedings strictly *in rem*, and that notice, even though required by statute, is not essential to jurisdiction. But we do not deem it necessary to inquire, in this case, how far it is possible to sustain such a doctrine, for by the statute under which these proceedings were had, a personal judgment could be rendered against the parties, execution issued, and their property sold. And the appellant seeks to derive title through a sale on such an execution. And we are clearly of the opinion that in such a proceeding the court acquires no jurisdiction to render a judgment until the parties are notified, as the law requires, for the reason that it is a proceeding *in personam*, as well as *in rem*.

The question, to what extent jurisdiction over the parties is to be presumed, from the judgment of a court of general jurisdiction, where the record fails to show it, is not involved, for the reason that the record here shows the mode of service. And I consider it well established by authorities, some of which were referred to in the case of *Rape vs. Heaton*, decided at the last term, 9 Wis., 328, that where the manner of service appears on the record, the court, where it is presented, must look into and determine whether jurisdiction was acquired. In this record the manner of service appears, though it is perhaps worthy of remark, that there is a discrepancy between the two records in this respect. In the one offered by the plaintiff below, the order of the court finding due service, recites the affidavit upon which it was based. Whereas, in the other, the affidavit is not recited. If this affidavit were the only part of record showing the mode of service, this discrepancy might be more material than we now regard it. For, if the affidavit did not appear, the court having found due service, this finding might be sufficient to compel the presumption that the parties were served with notice as the law required, upon which however, we express no opinion. The

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fact therefore that there are two copies of the same record, differing in this particular, which might be so important, gives rise to the suspicion that one or the other of them must have been prepared with direct reference to the legal effect of the presence or absence of the affidavit, showing the mode of service. If such has been the case, it was a proceeding which could not be censured with too great severity, whoever may have procured it to be done. But we do not conceive this to be so material as it otherwise might be, from the fact that both of the records show the notice that was served and the manner of service upon the parties who were residents of the territory, the affidavit only showing the mode of publication which was to reach non-residents, or those not found.

The second section of the act before referred to, provided that a copy of the petition should be served "*at least forty days* previous to the term on which it should be presented," on all the parties not joining in the petition, with a notice subscribed by the petitioner, that an application would be made to the court "*on some certain day* in term *to be specified therein*," or as soon thereafter as counsel could be heard, for the appointment of commissioners, &c. There is also a proviso, that if any of the parties were non-residents, or not found, the notice might be published for three months, once each week in a newspaper in the county where the premises were situated.

The notice in this case, of which, with the petition, the defendant Hedding accepted service on the 15th day of March, and the defendants Juneau and Parks, on the 2d day of April, 1838, simply states that an application will be made to the Hon. Charles Dunn, judge of the district court of Iowa county, for the appointment of commissioners to make partition of the premises, describing them. It states no time when, nor place where, the application will be made, and therefore utterly fails to comply with the requirements of the statute. Un-

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doubtedly no slight or immaterial variance should defeat such a proceeding, if the notice conveyed to the party substantially the information he was entitled to receive. But here was an utter failure. The essential requisites of the notice were wanting. The parties received no information whatever of the time or place when and where they were to appear to protect their interests. If the notice was good at all, it must have been good for all time, and the parties notified have been bound to be in perpetual attendance upon the Hon. Charles Dunn to find out when the application was to be made. The petition which was served with the notice, is entitled of the May term, 1838, but as if in illustration of the utter insufficiency of the notice, it was filed on the 20th day of April, 1838, only eighteen days after its service on Parks and Juneau, which it also appears, was on the eleventh day of the term. We have not access to any copy of the territorial laws fixing the terms at that early day; but it appearing from the records, that there was an April term, we are safe in assuming that there was no May term. So that the only allusion to any time, if the party could be held bound by allusions in the petition to a term generally, when the law required the notice to specify a day certain, would, in this instance, have served to mislead, and induce him to wait till May, while his rights were being determined by proceedings in April. The acceptance of service by the parties cannot be construed into a waiver of anything. It was simply evidence that the papers were served, and gave them no other effect than would the sheriff's return of service.

I cannot regard proceedings in which there was such an utter failure to comply with the most material requirements of the statute, as having conferred any jurisdiction over the parties so notified.

The affidavit also shows a non-compliance with the law in respect to publication. The notice was published a part of

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the requisite time in a newspaper in Iowa county; and that having been discontinued, it was afterwards posted on the court house door. If the publication was to be governed by the partition act, then the posting on the court house door would have been unauthorized.

But the appellant's counsel rely on another act, found on page 192, Mich. Laws, 1833, as authorizing the posting. This act provided that when any notice of an application to any judge of court, was required to be published in any newspaper, it should, in the counties of Brown, Iowa and Crawford, "be published by posting one copy of it on the door of the house where the circuit court was last held in the county in which such application is made," &c. It also provided that the court or judge might order a further publication in a newspaper, at his discretion.

Now, if this law was applicable to the case, and it would seem to be so, the notice should have been posted on the court house door during the whole time it was required to be published. And publishing a part of the time in a newspaper, and then posting it the balance of the time, was not a compliance with the mode provided by either statute.

We think, therefore, the circuit court was right in holding that it appeared on the face of the record, that the court acquired no jurisdiction of the parties in the partition suit, and that the judgment, for this reason, was void.

We have been pressed to sustain this record. It is said that many of the old records are imperfect, that titles have been acquired under them, and that to hold them void, would unsettle rights to property. There is great force in this argument. But I think it is allowed all its legitimate influence, in the establishment of the legal presumptions in favor of the validity of judgments. If parts of the records have been lost, they will be presumed such as were proper to support the judgment. If the record fails to show everything neces-

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sary, it will be presumed, unless the contrary appears, in favor of the judgments of superior courts, including even jurisdiction over the parties. And where jurisdiction exists, the judgment is valid for all purposes, no matter how erroneous, until reversed. I think this is going as far as policy or justice requires.

In considering the argument of convenience in favor of supporting records, it should not be forgotten that the same argument has force both ways; that those whose rights are divested by judicial proceedings, are entitled to some consideration in settling the rules of law by which such proceedings are to be judged, as well as those whose rights are acquired through them. And it is for their protection that the old rule exists, than which none is better settled, that the judgment of any court assuming to dispose of the rights of parties over whom it has not jurisdiction, is a nullity.

Where it appears, therefore, as it does here, that the parties were never notified of the proceedings against them, I know of no rule or principle of law, by which I can say the judgment was valid. To say so in this case, would seem to me to be saying that there is no rule of law applicable to these questions of jurisdiction, but that the court must decide every case upon its own discretion, in view of the probable evils or benefits to result from defeating or supporting the record. And no one can examine the cases on the subject without coming to the conclusion, that such has been practically, to a great extent, the standard by which they have been determined.

For my own part, I do not desire to be subjected to such a responsibility. I am willing to labor as patiently and thoroughly as I may, to find the law applicable to the case, but I am not willing to feel that, after such examination, there is no law; but that I am to decide it in view of its effect upon the parties.

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The subject is, undoubtedly, involved in much confusion and uncertainty, by the cases, but the principles by which we have determined the validity of this record, I believe to be supported by the soundest reasons, as well as decisions.

But it appears that the appellant offered in evidence certain tax deeds to Haight, through whom he claims title, which appear from the case, to include the same premises which were the subject of the particular suit. These were rejected, for what reason is not shown. We can see no reason why they were not admissible. Whether the party could have established a good title under them, is, of course, uncertain. But they were made by statute, and this court has decided them to be, *prima facie* evidence of the regularity of the proceedings in the tax collection and sale. They may have been liable to be invalidated by evidence, but we think the appellant had a right to offer them, and show title under them, if he could, and that the court erred in rejecting them.

For this error the judgment is reversed, with costs, and the cause remanded for a new trial.

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INDEX.

A

ADMINISTRATORS, &c.

An administrator is entitled to inquire into the condition of a copartnership between the deceased and another, even though the firm is declared insolvent, in order to reduce the indebtedness as much as possible, and for that purpose may maintain an action against the survivor. *Administrators of Jennings vs. Chandler.* 21

AGENT AND PRINCIPAL.

1. When there was conflicting evidence given in a case as to the extent of an architect's authority to purchase materials for a building over which he had charge, it is not proper to instruct the jury, that if they should find that the vendor at the time of the sale, had reason to believe, from the acts of the parties, that the architect was authorized to purchase such materials, then the owner was liable. *McDonald vs. Dodge.* 106

2. It is not proper in such a case, to instruct the jury that if they should find that the architect was the agent of the defendant, the owner, then his admissions and declarations would bind the defendant; and if he was acting for the defendant as his agent about the building, although his authority might not expressly extend to the purchasing of materials, still, if the vendor believed he was authorized to purchase, the defendant was liable. *id.*

3. Where an agent has rendered services and advanced money in procuring certain shares of stock and interest scrip to be exchanged for railroad bonds, bearing interest, and claimed a lien upon the bonds for the services and amount expended: Held that he was entitled to retain the bonds until the amount due him was paid. *Chappell vs. Cady.* 111

4. It is well settled as a rule of law that agents generally have a particular lien upon the property of their principals in their hands for the amount of their advances and services in respect to it. So a bailee has a lien for his services, where the property is enhanced in value by his services rendered upon it. *id.*

5. Where an agent receives one kind of chose in action, or representation of value, to be exchanged for another kind of chose in action, or better security, and he makes the exchange, he does not thereby lose his lien on the security; but for the purpose of the claim and lien it will be considered as the same thing first entrusted to the agent, and that the agent's services and advances have given it an additional value. In such a case the agent may be considered in the light of a factor, and entitled to the rights of such factor. *id.*

6. Where there is a delegation of a power for a private purpose, all must concur in the act to be done to make it valid, unless otherwise provided by the parties delegating the power; but where the power is intrusted for a public purpose a majority will govern, and their act is the act of the whole. *Soens et al. vs. City of Racine.* 271

7. To allow a party to prove the declarations of an agent of the opposite party, made after the transaction to which they relate, is erroneous. *Mil. and Miss. R.R. Co. vs. Finney.* 388

8. Where the misconduct of an agent causes a breach of the obligation or contract of the principal, then the principal is liable in an action, whether such misconduct be wilful or malicious, or merely negligent; and in such case, though the action be brought nominally in tort, it will be treated as *ex contractu*, and be governed by the same rules, unless the malice or wantonness of the agent be brought home and directly charged to the principal. *id.*

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AMENDMENT.

1. A plaintiff may amend his pleadings on terms so as to allow the note on which the action is founded to be read in evidence, if he would otherwise loose his right of action, by reason of the statute of limitation; and this, though the court had ordered a nonsuit, for want of evidence, but judgment had not yet been actually entered thereon. *Schiefflin et al. vs. Whipple.* 81

2. When the complaint is insufficient, the court will, on a proper application, grant an amendment so as to let in the testimony necessary to the maintenance or defense of an action. *Fobes vs. School District.* 117

3. Amendments to pleadings are matters addressed to the discretion of the court, and will not be reviewed, except in cases where it has been clearly abused. *Mil. M. R. R. Co. vs. Finney.* 388

See USURY, 11.

ANSWER.

See DEMURRER, 1.
FRIVOLOUSNESS, 6.
USURY, 8, 9, 10, 17, 18, 20.

APPEAL.

1. S. obtained a judgment before a justice of the peace, against G. & S., from which they took an appeal to the Circuit Court; held that such appeal, under the Code, only stays the execution, and does not prevent S. from filing and docketing a transcript of the judgment, in the office of the Clerk of the Circuit Court to create a lien on real estate. *Steckmesser vs. Graham.* 37

2. Where a justice of the peace sent the appeal papers to the Circuit Court of Jefferson county, when they should have been sent to Dodge county; this does not deprive the appellant of the right to have them sent to the proper court; nor does he lose his appeal thereby. *id.*

3. It is a general rule of the court to remand a case, for further proceedings, to the court below; but this rule will be changed upon the request of the parties, and for good cause shown. *Boyd vs. Sumner et al.* 41

4. Both parties to a judgment may appeal. *id.*

5. Where the clerk of the circuit court makes a mistake in dating the time when an appeal is filed with him, or does not file it on the day it is served upon him the party appealing will not thereby be deprived of his right to take the appeal. *Moyer vs. Strahl.* 83

6. An appeal from an order refusing a new trial, upon the ground that the verdict was contrary to law and evidence, does not bring up for the review of the supreme court any error of the judge in refusing instructions asked for. *Smith vs. Welch et al.* 91

7. Where a referee, appointed by the circuit court, to make sale of mortgaged premises, &c., performed the services, and presented his bill of fees, and upon a disagreement with him and the counsel of the party from whom he claimed, it was stipulated to submit the question of disagreement to the circuit judge, who decided that the amount charged was too large, and gave the referee a smaller sum, from which the referee appealed to this court; *held*, that the decision was not an appealable order; and the appeal must be dismissed. *Lansing's Appeal.* 120

8. Where parties submit a matter in dispute to the circuit judge for his decision, the judge in such case acts only as an arbitrator; and although the decision will bind the parties to it, yet it cannot be reviewed on appeal or writ of error any more than the decision of any private individual, to whom the same matter had been submitted. *id.*

9. Where an appeal is taken from an order "denying a motion made to set aside, and strike from the file the judgment roll," and the record showed no such order was made by the circuit court, the appeal will be dismissed. *Kellogg vs. Smith.* 135

10. An appeal will be dismissed unless there is a proper return of the record of the cause from the circuit court. *Hendricks vs. Van Camp.* 442

See BILLS OF EXCEPTIONS, 4, 5, 6, 7, 8.
ORDERS, 1, 2.

ARBITRATION.

1. Where a referee appointed by the

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circuit court to make sale of mortgaged premises, &c., performed the services, and presented his bill of fees, and upon a disagreement with him and the counsel of the party from whom he claimed, it was stipulated to submit the question of disagreement to the circuit judge, who decided that the amount charged was too large, and gave the referee a smaller sum, from which the referee appealed to this court; Held that the decision was not an appealable order; and the appeal must be dismissed. *Lansing's Appeal.* 120

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ASSESSMENT.

1. Where the assessors of the city of Milwaukee, in obedience to an ordinance of the common council, omitted to assess property to the value of $150,000, which ought to have been assessed, and that property was thereby exempted from taxation: Held, that such omission vitiated the whole tax. *Weeks vs. City of Milwaukee et al.* 242

2. Omissions to make assessments arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws, is intrusted, do not necessarily vitiate the whole tax; but an intentional disregard of those laws, in such a manner as to impose illegal taxes on those who are taxed, does. *id.*

3. The provision of the taxing laws, that where there has been an omission to tax property, it may be taxed the proper amount the next year, refers to such omissions as are constantly liable to happen, and does not invalidate the whole tax; but where the omission originated in an intentional departure from the law on the part of all the authorities, it renders the tax illegal, and it cannot be cured by that provision in the taxing laws. *id.*

4. Assessments upon certain lots for the purpose of constructing piers, &c., is not an appropriation of private property for public use, &c., it is merely the exercise of the taxing power for the public benefit. *Soens et al. vs. City of Racine.* 271

5. The legislature are not authorized to levy a tax for merely private or individual ends. The authority delegated to the legislature, and by them transferred to the municipal corporation, is to be exercised only for some object of public or common interest. *id.*

6. Though private property may be directly or indirectly protected, or private interests promoted by a given improvement, it furnishes no rule for deciding that the improvement is not public. *id.*

7. To determine whether a matter is of public or merely private concern, it is necessary to consider, not whether the interest of some individual will be promoted; but whether the whole, or the greater part of the community will be so. *id.*

See CONSTITUTIONAL LAW, 25, 28, 29, 30.
FRIVOLOUSNESS, 4, 5.
TAXES, 20, 21, 22.

ASSIGNMENT.

1. An assignee for the benefit of creditors, may attack the validity of a judgment entered upon the confession of his assignor. *Nichols. vs. Kribs et al.* 76

2. The lien of the mechanic, lumberman, &c., for work and materials, is a personal right, and cannot be transferred or assigned, so as to enable the assignee to prosecute the claim in his own name, and avail himself of the benefit of the lien given against the building. *Caldwell vs. Lawrence.* 331

3. Where A., being surety for B. upon certain promissory notes, received from him a bill of sale of certain goods purporting to be absolute, but at the same time executed and delivered to B. a written agreement, in which he recited the sale, and in consideration thereof promised, first, to pay in full the demands upon which he was surety; and, secondly, if the proceeds of the goods, when sold by him, should exceed the amount of such demands, to faithfully pay the overplus to the other *bona fide* creditors of B., *pro rata*, according to the amounts of their respective debts, both instruments are to be construed together, and in law, constitute an assignment for the benefit of creditors. *Norton vs. Kearney et al.* 443

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4. An assignment in which the assignee is "to dispose of the property to the best advantage in his discretion," is valid, and does not imply an authority to sell on credit. The discretion thus vested must be understood to be a legal discretion to be exercised within the limits of the law in such cases. There being ample room for the exercise of a discretion strictly legal, the law will not presume that the assignor intended the exercise of one which is illegal. *id.*

5. In a complaint for trespass for taking and carrying away goods assigned to the plaintiff for the benefit of creditors, it is improper, and foreign to the purpose of the action, to aver and prove that a mistake has occurred in drawing the assignment. Such a mistake could only be corrected in a direct proceeding for that purpose, where the creditors are made parties. *id.*

See CORPORATIONS, 13.
COUPONS, 1, 2, 3, 4.

ASSISTANCE, WRIT OF.

Where a sheriff had in his hands a writ of assistance, lawfully issued, to execute, he cannot excuse himself from its execution, because the defendant, in the writ, claims to hold the possession under a party having a title older than the title of the claimant in the writ. *State vs. Giles.* 101

AUDITOR OF STATE.

See SECRETARY OF STATE, 1, 2, 3, 4, 5, 6, 7.

B

BAIL.

1. If a party arrested on a defective process, put in special bail for his appearance, he thereby waives all objection to the process. *Risley vs. Harris.* 95

2. Where several partners made an assignment of their joint property, and afterwards one of the partners unlawfully obtained possession of a portion of it, and converted it to his own use, he may be arrested for such cause of action, and held to bail under the code. *id.*

BANKS.

1. There being no penalty provided in the general banking law for a violation of the same by a bank in taking more than 10 per cent. interest, the general law relating to usury applies to, and has the same effect upon a contract made in violation of the charter by the bank, as upon a contract made by an individual. *Rock River Bank vs. Sherwood.* 230

2. When a bank reserves a greater rate of interest than its charter allows, the general usury laws apply to the contract, although it does not exceed the rate prescribed by such usury law; and the general law is modified by a restriction in the bank charter, to the extent of the restriction. *id.*

3. A pleading which avers that a bank had no authority to take a note which reserves a greater rate of interest than the bank is authorized to take, does not raise the question of usury, but of capacity in the bank to make the contract. *id.*

4. Where S. had overdrawn his account with a bank, and then made a note to the bank putting into it the amount of interest then due at 10 per cent., and making the note draw interest at 12 per cent. when due: Held, that such contract was not void by reason of the banking law of Wisconsin, which authorized the bank to receive a rate of interest not exceeding 10 per cent. *id.*

5. The banking law of Wisconsin provides no penalty or forfeiture in case a bank takes more than 10 per cent. interest. *id.*

BANK COMPTROLLER.

1. The Bank Comptroller has authority to order such printing as is necessary or convenient for the use of his department, but not such as is not so authorized. *State ex rel. Carpenter vs. Hastings.* 518

2. Whether certain printing, ordered by the Bank Comptroller, was authorized by law. *Quere.* The question may be both of fact and law depending on each case. *id.*

3. The law does not seem to authorise the Bank Comptroller to make use of bank statements, or impose upon him any duty in the performance of which they might have been used. *id.*

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BILL OF EXCEPTIONS.

1. If a party to an action desire the supreme court to review the testimony, to see if it supported the conclusions of the court below upon the facts, he should cause a case to be made, or bill of exception settled, embracing the testimony; otherwise, the facts will not be re-examined, even in an equity case. *Davidson vs. Davidson.* 86

2. A certificate of the judge who tried the cause that the printed case contains copies of the complaint, answer and evidence produced in the court, &c., cannot be used as a substitute for a case or bill of exceptions. *id.*

3. Where judgment has been rendered in the circuit court, and no case or bill of exceptions is made, so as to enable the supreme court to examine the merits of the case, on the testimony, the judgment will be affirmed. And there would seem to be no difference in this respect between an action at law or in equity. *Phillips' Heirs vs. Swart et al.* 426

4. No bill of exceptions is necessary to enable this court to review proceedings upon an appeal from an order. *Dunbar vs. Hollingshead.* 505

5. Exceptions are only necessary when the appeal is from a final judgment, and a review of an intermediate order is sought. *id.*

6. A writ of error at common law only lay for matters apparent on the record. Hence, exceptions were introduced, and their office is to place on the record alleged errors which could not otherwise appear. *id.*

7. Sections 16 and 20, of chap. 132, R. S., relating to exceptions, apply to appeals from final judgments, and not to cases where a party desires to exercise the right of appeal for the purpose of reviewing the decision upon a motion not in the nature of a final judgment. And section 5, chap. 139, is consistent with this rule. *id.*

8. Where there has been no motion for a new trial, in the court below, and saved by bill of exceptions, the appellate court will not look into the evidence to see whether it will sustain the finding of the court below. *Woodward vs. Howard.* 512

BOATS AND VESSELS.

1. The right of a party having a claim against a boat or vessel, for which he may sue the vessel itself, under the boat and vessel act, is not cut off, if before he sues, but within the time in which by the act he was entitled to sue, the boat is sold on an execution issued on a personal judgment against the owner. *Hay et al. vs. Steamboat Winnebago.* 428

2. The sale of a boat or vessel by the owner, on an execution against the owner, does not divest such boat or vessel of the capacity to owe or be bound for a debt, and to be sued for the payment of the same. *id.*

3. Where a party had furnished materials for the construction of a steamboat, and had given a credit for the period of time within which he could commence an action against the boat, under the boat and vessel act, he cannot commence the action against the boat after the expiration of the credit. *Emerson vs. Steamboat Shawano City.* 433

4. The statute concerning boats and vessels, gives those claims which may be prosecuted under it a preference in the nature of a lien over other debts of a general nature existing against the owners, and such claims cannot be defeated by a sale by the owners, provided the proceedings are had within the time limited by the act. *id.*

5. The limits prescribed by the act concerning boats and vessels, within which actions should be commenced against the boat or vessel itself, should be measured from the time the services were performed, or materials actually furnished, and not from the expiration of the period of credit which the parties may agree upon. *id.*

6. A complaint against a boat, averring that she was used "in navigating the waters of the State of Wisconsin," does not show that the vessel was used *exclusively* to navigate the *inland* waters of the state, so as to make it necessary to bring an action for supplies against it within three months. *id.*

C

CAPIAS.

1. If a party arrested on a defective

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process, put in special bail for his appearance, he thereby waives all objection to the process. *Ilsley vs. Harris.* 95

2. Where several partners made an assignment of their joint property, and afterwards one of the partners unlawfully obtained possession of a portion of it, and converted it to his own use, he may be arrested for such cause of action, and held to bail under the code. *id.*

3. The court will not vacate an order for arrest because the officer making the arrest does not serve the copy of the affidavits for the space of two hours after the arrest is made, if the arrest is otherwise regular and proper. *id.*

4. An order for arrest of the defendant in a suit, is a *writ* or *process* within the constitution, and should run in the name of "the state of Wisconsin;" but such style is matter of form, and may be amended on motion. *id.*

See EJECTMENT, 1, 2, 3.

CASES CONSIDERED, &c.

The case of *Young vs. Wright*, 4 Wis., 144; S. C., 6 id., 127, considered and approved. *Bateman vs. Johnson.* 1

The cases of *Berry vs. Nelson*, 4 Wis., 375, and of *Berry vs. Doty*, 5 Wis., 605, examined and explained. *Power vs. Catlin.* 26

The case of *Shoyer vs. Fox River Rail Road Co.*, 7 Wis., 365, considered and approved. *Schieffilin et al. vs. Whipple.* 81

The cases of *Van Slyke vs. Carpenter*, 7 Wis., 173; *Grubb vs. Remington*, id., 349; and *Farmers' and Millers' Bank vs. Sawyer*, id., 379, considered and approved. *Moyer vs. Strahl.* 83

The cases of *Maynard vs. Tidball*, 2 Wis., 34; *Goodrich vs. Compound School District No. 5*, id., 102; *Philips vs. Bridges*, 3 id., 270; *Lester vs. French*, 6 id., 580; considered and approved. *Fobes vs. School District.* 117

The case of *Von Baumbach vs. Bade*, 9 Wis., 597, considered and approved. *Starkweather vs. Hawes, et al.* 125

The case of *The State ex rel. Cothren vs. Lean*, 9 Wis., 279, considered and approved. *Clark vs. City of Janesville.* 136

The case of *Peck vs. Norton*, 3 Wis., 714, alluded to and approved. *Bushnell vs. Beloit.* 195

The case of *Knowlton vs. Supervisors of Rock Co.*, 9 Wis., 410, considered and approved. *Weeks vs. City of Milwaukee.* 242

The case of *Goodall vs. The City of Milwaukee*, 5 Wis., 32, considered and approved. *id.*

The case of *Madison, &c., Plank Road Co. vs. Watertown, &c., Plank Road Co.*, 7 Wis., 59, considered and approved. *Rock River Bank vs. Sherwood.* 230

The cases of *Lumsden vs. City of Milwaukee*, 8 Wis., 485, and *Weeks vs. City of Milwaukee, supra*, 242, considered and approved, in relation to assessments by municipal corporations. *Soens et al. vs. City of Racine.* 271

The cases of *Delaplaine vs. Cook*, 7 Wis., 44, and *Knowlton vs. Supervisors of Rock County*, 9 id., 410, considered and approved. *Lumsden vs. Cross.* 282

The cases of *Farmers' and Millers' Bank vs. Sawyer*, 7 Wis., 379; *Van Slyke vs. Carpenter*, id., 179; *Martin vs. Weil*, 8 id., 220, considered and approved. *Cahoon vs. Central R. R. Co.* 290

The case of *Platt vs. Robinson, supra* 128, considered and approved; the case of *Fisher et al. vs. Otis*, 3 Chand., 83, considered and defined. *Newman vs. Kershaw.* 333

The case of *Newcomb vs. Smith*, 1 Chand. 71, considered and followed. *Fisher vs. Horicon Iron & Manu. Co.* 351

The cases of *How vs. English*, 6 Wis., 262, and *Wood et al. vs. Trask et al.*, 7 id., 566, cited and followed. *Sauer vs. Steinbauer.* 370

The case of *Kreuger vs. Zirbel*, 2 Wis., 233, considered and approved. *Dunning vs. Falkner.* 394

The case of *Sewell vs. Eaton*, 6 Wis., 490, considered and approved. *Sandborn vs. Hunt.* 436

The cases of *Hutchinson vs. Lord*, 1 Wis., 286, and *Keep vs. Sanderson*, 2 id.,

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42, considered and distinguished. *Norton vs. Kearney.* 443

The case of *Jones vs. Lake*, 2 Wis., 210, considered and approved. *id.*

The cases of *Holmes vs. Lewis*, 2 Wis., 83; *Tallman vs. Tuesdell et al.*, 3 id., 443; and *Remington et al. vs. Cummings*, 5 id., 138, considered and approved. *Wells vs. Morton.* 468

CHATTEL MORTGAGE.

1. A chattel mortgage containing these words: "All my stock of harnesses, whips, saddles, and other merchandise, now on hand, manufactured, *or such as shall be manufactured, or bought and contained in the shop or store occupied by me,*" &c., and containing a power of entry, and seizure on default, gives the mortgagee a revocable license to enter on the premises, and take the after acquired property; and if unrevoked, it justifies him to enter and take possession, according to the terms of the license, and the title is good as being taken with the assent of the grantor, but if before the license is executed, it is revoked; then it becomes inoperative and void. The instrument is not a transfer, but it may operate as a license to take the property. *Chynoweth vs. Tenney.* 397

2. On the trial of an action of replevin, the defendant claimed the right to take the goods, by virtue of a chattel mortgage, made by the plaintiff to the defendant, which specified all the stock, &c., on hand, and also "such as shall be manufactured, or bought and contained in the shop," the plaintiff asked the court to instruct the jury, that if they found the property in question was manufactured after the execution of the mortgage, and from materials purchased after its execution, in that case the mortgage, as to those articles, was inoperative, and would not justify the defendant in taking them, against the plaintiff's will; *held*, that this was a proper instruction. *id.*

3. The maxim "that a man cannot grant or charge that which he hath not," considered and enforced; and it makes no difference whether the controversy be between the parties to the grant, or otherwise. *id.*

4. A chattel mortgage of after acquired property is not effectual to create a lien in equity in the mortgagee, upon the property. *id.*

5. A chattel mortgage of after acquired property cannot be sustained as an executory contract, conferring an authority upon the grantee to enter, take and hold the property, against the will of the grantor. *id.*

6. Where the mortgagee of chattels is in possession of the property, it is not necessary to renew his mortgage by affidavit, to enable him to maintain an action for the possession of the property. *Bates vs. Wilbur.* 415

CLERKS OF COURT.

Section 27, chap. 132, authorises clerks of the court to enter up judgments in vacation, in the absence of the judge, and without his order or direction, upon filing with him proof of the existence of one of the causes for judgment therein specified. PAINE, J., dissenting. *Wells vs. Morton.* 468

See JUDGMENT, 5.

COGNOVIT.

A confession for a judgment which states that the defendant purchased of the plaintiff in the month of March, 1857, a large quantity of goods and wares, in New York, to the amount and value of $1,916, at six months' credit from the 21st of March, and received the goods, &c., and there is now due said plaintiff the sum $1,090, &c., does not sufficiently state the facts upon which the indebtedness arose, to authorise the judgment to be rendered; and such a judgment will not protect the sheriff in making a levy upon the property of the defendant in the hands of his assignee. *Nichols vs. Kribs et al.* 76

See WARRANT OF ATTORNEY, 1, 2, 3, 4, 5, 6.

COMMISSION.

See AGENT AND PRINCIPAL, 6.
TAXES, 14.

COMMON CARRIERS.

Where a railroad company, as common carriers, have received goods, and given a receipt for them, which states that they were received in "apparent good order,"

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it is competent for the company to show, by parol testimony, that the goods most probably had been injured before they came into the possession of the company. *Blade vs. Chi., F. & St. P. R. R.* 4

COMPLAINT.

If a complaint is not sufficiently certain, the remedy is not by demurrer, but by motion to make more definite and certain. *Markwell vs. Supervisors of Waushara.* 73

See ASSIGNMENT, 5.
PLEADINGS, 5, 6.
WARRANT OF ATTORNEY, 1, 2.

CONSTITUTIONAL LAW.

1. The act of the legislature, dated 15th May, 1858, relating to the foreclosure of mortgages, commonly called the "Mortgage Stay Law," is constitutional. *Starkweather vs. Hawes et al.* 125

2. An act of the legislature which regulates the manner in which sales should be conducted, under judgments already rendered, is not obnoxious to the objection that the legislature has assumed judicial power. *id.*

3. Sections 3 and 10, Art. VIII., of the constitution of Wisconsin, which provides that "the credit of the state shall never be given or loaned in aid of any individual association or corporation," and that "the state shall never contract any debt for works of internal improvement, nor be a party in carrying on such work," &c., are limitations upon the power of the state itself, and not a prohibition upon the legislature to authorize counties, towns, and cities, to loan their credit, or contract debts for works of internal improvement. *Clark vs. City of Janesville.* 136

4. Section 3, Art. XI., of the constitution of Wisconsin, expressly recognizes the power of municipal corporations to loan their credit, and requires the legislature to restrict it. *id.*

5. The constitution did not intend to prohibit the legislature from allowing counties, towns and cities to loan their credit to works of internal improvement, but to permit that power to be exercised under such restrictions as to the legislature might seem proper. (Per COLE, J.) *id.*

6. The legislature authorized the mayor of the city of Janesville, to subscribe $150,000 for stock in any railroad running to, or passing through the city. If the common council should submit the question whether the stock should be taken to the electors of the city, and a majority should vote in favor of the subscription, and then the council should pass a resolution that the mayor might subscribe, &c. These provisions are sufficient restrictions under the constitution upon the power of the city to loan its credit for works of internal improvement. (Per COLE, J.) *id.*

7. The object of the prohibition in section 10, Art. VIII., of the constitution of Wisconsin, against the state contracting any debt for works of internal improvement, or being a party to carrying them on, does not require counties, towns, and cities to be included in the prohibition. It was to prevent the state from becoming a party to them, not to prohibit the works from being carried on. *id.*

8. The prohibitions in Art. VIII. of the constitution of the state of Wisconsin, were not designed to protect the citizens of the state from taxation, for purposes of internal improvement, but to prevent the state from being a party to such works. *id.*

9. The constitution gives the power to the legislature to adopt such restrictions as may be necessary, to prevent the evils which may result to counties, towns, and cities, if allowed to engage in public works, and tax the citizens therefor. The remedy for abuses under such power is to be found in the wisdom and integrity of the people, not in the restrictions of the constitution. *id.*

10. Section 1, Art. XI., which provides that corporations without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws," is not a prohibition against investing a municipal corporation with authority for any purpose. *id.*

11. The charter of the city of Janesville is a general law, within the provision of Art. VII., § 21, of the constitution of Wisconsin, which requires that "no general law shall be in force until published." The words, "general law" as here used, have the same meaning as *public act*, in

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the ordinary acceptation, and they are convertable terms. (COLE, J., dissenting.) *id.*

12. The words "general law," in §§ 1 and 4, Art. XI., of the constitution, are clearly used as opposite to *special*, and without any design of indicating the public or private character of the law. The whole object and scope of the restriction are aimed at special legislation. (COLE, J., dissenting.) *id.*

13. In § 21, Art. VII., the words "general law," are not used as contra-distinguished from local or "special," but they are used in their usual meaning of public. (COLE, J., dissenting.) *id.*

14. The object of § 21, Art. VII., was to protect the people from the effect of laws which they had no means of knowing, and yet are bound to take notice of. *id.*

15. Laws are public or private, not because of convenience in pleading them, or because courts take notice of them; courts and every body else are bound to take notice of certain laws, because they are public. *id.*

16. The charter of the city of Janesville is a general law, within the provision of Art. VII., § 21, of the constitution, and was not in force until published under and by authority of law. (COLE, J., dissenting.) *id.*

17. An act of the legislature authorising the town of Beloit to subscribe for the stock of a railroad company, and to incur indebtedness for making internal improvements, is a valid act; and the corporation is liable for the payment of such indebtedness. *Bushnell vs. Beloit.* 195

18. The courts will not declare an act of the legislature authorising a municipal corporation to subscribe for stock in a railroad company unconstitutional, solely on the ground that such legislation is not wise and wholesome, but is evil and pernicious in its consequences. *id.*

19. The evident intent of Art. VIII of the constitution of Wisconsin in restricting the legislature from contracting state indebtedness for works of internal improvement, applies only to the state finances, and was not designed to regulate those of the towns, counties and cities, or to restrain them from loaning their credit in aid of such works; but these, when properly authorized, may contract such indebtedness, and become parties to such works. *id.*

20. A town, city or county, may give or loan its credit in aid of a corporation, without the credit of the State becoming pledged in any way thereby. The indebtedness would be that of the town, &c., and not of the state. *id.*

21. It is a well settled political principle, that the constitution of a state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature; and it is competent for the state legislature to exercise all legislative power not forbidden by its own constitution, or that of the United States, or delegated to Congress. *id*

22. The state legislature may authorize that to be done by another which the state cannot itself do, by reason of a prohibition in the constitution. This principle is based upon the unrestricted power in the legislature to create corporations, or allow individuals to do acts inhibited to the state to engage in. Art. IX of the constitution of Wisconsin is consonant to this principle. *id.*

23. Section 3, Art. XI, of the constitution of Wisconsin, clearly recognises the principle that municipal corporations may be clothed with power to "borrow money," "contract debts," and to "loan their credit." The fact that it was required by the legislature to restrict the power of these corporations in these respects, is evidence that the power existed; as a power cannot be restricted unless it exists. *id.*

24. The constitution of Wisconsin neither expressly nor by any fair implication, prohibits the legislature from granting the power to towns, cities and counties, to subscribe for the stock for the construction of railroads in which they are interested, and to issue their bonds therefor. *id.*

25. Where the city of Milwaukee levied special taxes upon the lots of W. for the purpose of building streets and sidewalks in front of the same: *Held*, that these assessments could be sustained, on the ground that it was an exercise of the taxing power of the state and city, and was not a taking of private property for public use. *Weeks vs. City of Milwaukee.* 242

26. The constitutional provision, that

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"the rule of taxation shall be uniform," extends to all taxation by cities, towns and counties, in their exercise of the taxing power delegated to them by the state. The object of this provision was to protect the citizen against unequal and consequently unjust taxation. *id.*

27. "The uniform rule of taxation" provided for by Art. VIII., § 1, is applicable to municipal corporations, notwithstanding the provision of Art. XI., § 3, requiring the legislature in establishing them to restrict their powers of taxation, so as to prevent abuses, &c. This last provision was designed to furnish a further protection. *id.*

28. Assessments of special taxes upon lots for the purpose of constructing streets and sidewalks in front of such lots cannot be upheld by the constitution of Wisconsin, under the rule of uniformity of taxation alone; but it can be, under the provision requiring the legislature to restrict the power of municipal corporations in making assessments. *id.*

29. The word "assessment," as used in Art. XI., § 3, of the constitution of the state of Wisconsin, has reference to the system of special taxation for municipal improvements existing at the adoption of the constitution, and is a clear recognition of the existence of the power to make the special tax. *id.*

30. The provision of Art. XI., § 3, recognizes the power of special assessments in municipal corporations, and is so far a modification of the rule of uniformity, in Art. VIII., § 1, as the system of assessment is a departure from that rule; and, thereby, every lot may be compelled to build the street in front thereof, with such exceptions as the law may provide. The only remedy for abuses under this rule, is such restrictions as the wisdom of the legislature may impose on the exercise of the power. *id.*

31. Where, by an act of the legislature, the farming lands of W. had been annexed to the city of Milwaukee, and afterwards taxed at the same rate as other city property to pay the debts of the city: *Held*, that the act was constitutional, and the taxation was legal. *id.*

See Assessment, 1, 2, 3, 4, 5, 6, 7.
Mills and Mill Dams, 1, 2, 3.
Replevin, 3.
Secretary of State, 1, 2, 3, 4, 5, 6, 7.
Taxes, 20, 21, 22.

CONTEMPT.

1. In general, no appeal will lie to this court, upon a conviction for contempt; but section 13, chap. 155, R. S. 1858, has excepted a sheriff from this rule. *State vs. Giles.* 101

2. Where a sheriff had in his hands a writ of assistance, lawfully issued, to execute, he cannot excuse himself from its execution, because the defendant, in the writ, claims to hold the possession under a party having a title older than the title of the claimant in the writ. *id.*

CONTRACTS.

1. Where M. entered into a contract with D. to make a deed of certain land within one year; and on the third day after the year expired, he made such deed and delivered it to D.: *Held*, that M. was not in default for not making the deed before that day. A vendor of real estate, who has covenanted to convey by a day certain, is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and waited a reasonable time. *Dye vs. Montague.* 18

2. An action of debt for the payment of a stipulated amount, can be maintained for the breach of an agreement, which provides that "if either party shall refuse to perform this agreement, the party so refusing shall forfeit and pay to the other party the sum of $1000, as stipulated damages;" if it shall also appear from the case, that independently of the agreement, the damages would be wholly uncertain and incapable of being ascertained except by conjecture. *Pierce vs. Jung.* 30

3. An agreement to pay money in the form of a promissory note, except adding the words "with exchange on New York," is a contract for the payment of money only, and may be declared on as such. A demurrer to the complaint for the reason that it is not such a contract, will be declared frivolous. *Leggett vs. Jones.* 34

4. Whether a contract to pay money on a given day, and which also provided that if the payments were not made on that day, then interest at 24 per cent. per annum, until paid, is legal interest and should be allowed. Quere. *Boyd vs. Sumner et al.* 41

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5. If the principal debtor has acquiesced in a judgment to pay more than legal interest, a subsequent incumbrancer cannot complain of the judgment, unless he also shows that he has sustained injury thereby. *id.*

6. It is competent for parties to contract for a reasonable amount as solicitor's fees in the foreclosure of a mortgage, and such agreements will be enforced by the courts. In such case the court should refuse to tax a statute fee for the solicitor. *id.*

7. All contemporaneous agreements between the same parties and in relation to the same subject matter, are to be taken together, and construed as one instrument, for the purpose of determining the character of the transaction, and the intention of the makers. *Norton vs. Kearney et al.* 443

See ASSIGNMENTS, 1. 2.
BANKS, 1, 2, 3, 4, 5.
FRAUDS, STATUTE OF, 1, 2, 3, 4, 5.
USURY, 12, 13, 14, 15, 18, 19.

CONVEYANCES.

In an action for a breach of a contract to convey real estate, it is a good answer, that a good and sufficient deed of the premises has been executed by the party in whom the legal title to the premises was, and tendered to the plaintiff, and he refused to receive it. *Bateman vs. Johnson.* 1

CORPORATIONS.

1. Where the charter of a city empowered the common council, by an ordinance, to submit to the voters of the city, the question whether the city should subscribe for stock in a railroad, and issue its bonds, and that ordinances be published before taking effect, &c.; and the ordinance authorising the submission and the notice of the election, were both contained in the same newspaper; held, that such notice was legally published. *Clark vs. City of Janesville.* 136

2. Where a city had issued bonds, with coupons attached, which had passed into the hands of *bona fide* purchasers for value, the city cannot defeat an action on the coupons, by showing that the election authorising the issuing of them, was not regular. *id.*

3. Bonds, with coupons attached, issued by a corporation, are intended be thrown into the market and sold, and it would be an inequitable rule to hold that they were void in the hands of a *bona fide* purchaser, on account of some defect in the notice of election, or some slight irregularity in conducting the same (per COLE, J.) *id.*

4. Where the right of the common council to authorise the mayor of a city to subscribe for stock in a railroad company, depended on a vote of the electors of the city, and the bonds are issued, the presumption is, that the city authorities proceeded according to, and complied with all the provisions of law. (Per COLE, J. *id.*

5. The bonds issued by the city of Janesville, were made payable to the railroad company or its assigns, and the coupons attached were payable to the railroad or bearer; and the bonds were assigned to ——— or bearer, and sold by the railroad. These securities are designed to be thrown upon the market for sale, to raise money upon, to pass from hand to hand by delivery, and by common usage are so passed; and, though they are not, strictly speaking, commercial paper, like bills of exchange, &c., yet they circulate in market much like these instruments, and are intended to answer the same purpose; therefore, being transferred by assignment and delivery, a complete title is conferred upon the holder, relieved from existing equities, at the time of the assignment between the maker and the assignor. (Per COLE, J.) *id.*

6. A statute, authorising a municipal corporation to issue bonds, &c., is a public law; and a purchaser of such bonds is bound to see that the authority to issue them existed; but though the exercise of the power is made to depend upon an election, he is not bound to inquire into the regularityof the election. He may presume that the preliminary steps have been taken according to law; nor is he bound to inquire into the existence and regularity of those steps. *id.*

7. The rule that parties dealing with officers of corporations are bound to know that they have authority to act, though proper for the protection of those whom the officers represent, is not to be carried so far as to destroy the safety and rights of those who with good faith and due diligence deal with the corporation. *id.*

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8. Where the act, in pursuance of which bonds are issued by a city, is a public statute, the person dealing in them is chargeable with knowledge of the existence of the act. If it appears that the act has not been published, and is not in force, the authority to issue the bonds does not exist. *id.*

9. If a city is authorized to subscribe for stock of a railroad company, and issue its bonds to the company for the stock, it cannot defeat an action on the bonds, on the ground that the company's charter did not authorize it to receive the bonds in payment for stock. The power to issue the bonds for the stock, carries with it the incidental power to receive them by the company, and issue the stock therefor, without an express authority in the company's charter for that purpose. *id.*

10. Though the charter of a railroad company only authorized it to receive subscriptions to its stock, upon instalments payable at call, yet if a municipal corporation is afterwards authorized to subscribe for the stock of the company by a loan of its credit, the railroad company thereby becomes authorized to receive the loan, and the act allowing the subscription, works a modification of the railroad charter to that extent. (Per COLE, J.) *id.*

11. Whether the construction of a railroad beyond the corporate limits of a city be a municipal purpose or not, is discussed but not decided. *id.*

12. An act which authorized a town to subscribe for the stock of a railroad, is sufficient authority to the railroad company to receive the subscription and to take the bonds of the town as pay for the stock. *Bushnell vs. Beloit.* 195

13. A power in a town to issue bonds to pay for stock in a railroad, carries with it the incidental power to issue them in a negotiable form, and to give them the character belonging to that class of securities in the market. *id.*

14. A corporation is not only incapable of making contracts which are forbidden by its charter, but in general, it can make none which are not necessary either directly or indirectly, to effect the objects of its creation. *Rock River Bank vs. Sherwood.* 230

15. When a corporation undertakes to make a contract entirely foreign to the purposes and objects of its creation, such contracts are void. *id.*

See ASSESSMENT, 4, 5, 6, 7.
CONSTITUTIONAL LAW, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 18, 19, 20, 22, 23.
MILLS AND MILL DAMS, 2.

COSTS.

1. In those actions of which justices of the peace have jurisdiction, and which are sued in the circuit or county court it is the amount recovered in the latter courts which determines whether the plaintiff or defendant shall have costs, and how much. *Dunning vs. Faulkner.* 394

2. Costs are allowable to the defendant in all actions for the recovery of money, brought in the county or circuit court, which are cognizible before a justice of the peace, unless the plaintiff shall recover judgment for $50 or more, and it makes no difference that the plaintiff's claim may exceed the jurisdiction of the justice. *id.*

COUNTIES.

1. A suit may be maintained against a county, upon a county order, after it has been presented to the treasurer of the county, and payment refused. Such an action is provided for by express statute, and gives the judgment creditor a decided advantage over other creditors, or county order holders. *Savage vs. Supervisors, &c.* 49

2. An action can be maintained against a county, upon a county order, after the same has been presented to the county treasurer for payment, and payment refused for want of funds in the treasury. *Markwell vs. Supervisors, &c.* 73

COUNTY ORDERS.

1. A suit may be maintained against a county, upon a county order, after it has been presented to the treasurer of the county, and payment refused. Such an action is provided for by express statute, and gives the judgment creditor a decided advantage over other creditors, or county order holders. *Savage vs. Supervisors, &c.* 49

2. A county order is a simple contract, and an action upon it is barred by the

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statute of limitations, in six years from the date of presentation for payment. *Pelton vs. Supervisors, &c.* 69

3. Although an action be barred on a county order, by the statute of limitations, still it is available to the holder, to the amount of its face, in payment of county taxes, under the provisions of the tax laws. *id.*

See COUNTIES, 2.

COUPONS.

1. Where a city had issed bonds, with coupons attached, which had passed into the hands of *bona fide* purchasers for value, the city cannot defeat an action on the coupons, by showing that the election authorizing the issuing of them, was not regular. *Clark vs. Janesville.* 136.

2. Bonds with coupons attached, issued by a corporation, are intended to be thrown into the market and sold, and it would be an inequitable rule to hold that they were void in the hands of a *bona fide* purchaser, on account of some defect in the notice of election, or some slight irregularity in conducting the same. (Per COLE, J.) *id.*

3. The bonds issued by the city of Janesville were made payable to the railroad company or its assigns, and the coupons attached were payable to the railroad or bearer; and the bonds were assigned to —— or bearer, and sold by the railroad. These securities are designed to be thrown upon the market for sale, to raise money upon, to pass from hand to hand by delivery, and by common usage are so passed; and, though they are not strictly speaking, commercial paper, like bills of exchange, &c., yet they circulate in market much like these instruments, and are intended to answer the same purpose; therefore, being transferred by assignment and delivery, a complete title is conferred upon the holder, relieved from existing equities, at the time of the assignment between the maker and the assignor. (Per COLE, J.) *id.*

6. A suit may be maintained upon the coupons without the production of the bonds to which they have been attached; but in this case, as the action is brought by the holder and owner of the bonds, he is entitled to recover. (Per COLE, J.) *id.*

See CORPORATIONS, 12.

COURT COMMISSIONER.

A county judge in the exercise of the power of a circuit judge at chambers, may make the necessary orders in a suit of partition. *Marvin vs. Titsworth.* 320

See WARRANT OF ATTORNEY, 1, 2, 3, 4, 5.

CREDITOR'S BILL.

Where a creditor's bill showed that judgment had been entered and execution issued thereon, which were confessed in the answer, it is not competent for the defendant to show that no such judgment had in fact been entered, and thus deprive the court of jurisdiction of the case. *Wanser vs. Howland.* 8

See SUPPLEMENTAL PROCEEDINGS, 1.

D

DAMAGES.

1. An action of debt for the payment of a stipulated amount, can be maintained for the breach of an agreement, which provides that "if either party shall refuse to perform this agreement, the party so refusing shall forfeit and pay to the other party the sum of $1000, as stipulated damages;" if it shall also appear from the case, that independently of the agreement, the damages would be wholly uncertain and incapable of being ascertained except by conjecture. *Pierce vs. Jung.* 30

2. In an action against a railroad company for the misconduct of the conductor in expelling the plaintiff from their cars, before he reaches the place to which he had purchased a ticket, the measure of damages is such sum as would compensate him for his actual loss by being put off the cars, and not vindictive damages or smart money; unless it appear that the conduct of the conductor was malicious, and his act was authorized or sanctioned by the company. *Mil. & Miss. R. R. Co. vs Finney.* 388

See FRIVOLOUSNESS, 5.

DEBT.

An action of debt for the payment of a stipulated amount, can be maintained for the breach of an agreement, which pro-

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vides that "if either party shall refuse to perform this agreement, the party so refusing shall forfeit and pay to the other party the sum of $1,000, as stipulated damages;" if it shall also appear from the case, that independently of the agreement, the damages would be wholly uncertain and incapable of being ascertained except by conjecture. *Pierce vs. Jung.* 30

DECLARATION.

Where the cause of action arose upon a promisory note, and the declaration was in common money counts alone, without a copy of the note, then the note could not be read in evidence. *Schieffelin et al. vs. Whipple.* 81

See COMPLAINT, 1.
PLEADINGS, 5, 6.

DEMURRER.

If an answer is indefinite and uncertain, the remedy under the code is by motion to make it more certain, and not by demurrer. *Bateman vs. Johnson.* 1

See COMPLAINT, 1.

DISCOVERY.

See USURY, 21.

E

EJECTMENT.

1. An execution can issue against the body of the defendant upon a judgment for damages for withholding real property, and the rents and profits, where pursuant to section 73 of the code, a claim for such damages was united in the complaint in the action for the recovery thereof. *Howland vs. Needham.* 495

2. The action of ejectment is an action *ex delicto*, and the 16th section of Article I. of the constitution, providing that "no person shall be imprisoned for debt arising out of, or founded upon contract," does not apply to the judgment rendered in such action, but the plaintiff is entitled to have a *ca. sa.*, to enforce his judgment against the defendant. *id.*

3. Though the legislature may change the *form* of the action, they cannot change the *essence*. They may make but *one form* of action, but they cannot change torts into contracts, nor contracts into torts. *id.*

See JURISDICTION, 7.

EQUITY.

After the act allowing a non-resident to come in, by petition, and defend in a chancery case, and that the petition should operate to set aside a sale of mortgaged premises, had been repealed, the rights of the defendant to set aside the sale are extinguished by the repeal; and the defendant can only pursue his remedy against the proceeds of the sale. *Powers vs Catlin et al.* 26

ESTOPPEL.

An estoppel *in pais* happens where a party makes a statement or an admission, with the intention of influencing the conduct of another, who acts upon the confidence of such a statement or admission, and will suffer injury if the party is permitted to deny it. *Norton vs. Kearney et al.* 443

See PARTITION, 1, 7, 8.

EVIDENCE.

1. Where a railroad company, as common carriers, have received goods, and given a receipt for them, which states that they were received in "apparent good order," it is competent for the company to show, by parol testimony, that the goods most probably had been injured before they came into the possession of the company. *Blade vs. Chicago, F. and St. Paul Railroad.* 4

2. In an action commenced by a surviving partner, it is not competent for the defendant to prove by his own oath, what the contract made with the deceased partner was. As to the survivor the deceased stands in the relation of a deceased agent. *Rogers vs. Brightman.* 55

2. Where the cause of action arose upon a promisory note, and the declaration was in common money counts alone, without a copy of the note, then the note could not be read in evidence. *Schieffilin et al. vs. Whipple.* 81

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4. A plaintiff may amend his pleadings on terms so as to allow the note on which the action is founded to be read in evidence, if he would otherwise loose his right of action, by reason of the statute of limitation; and this, though the court had ordered a nonsuit, for want of evidence, but judgment had not yet been actually entered thereon. *id.*

5. The legislature has power to declare by law what shall be the effect of instruments made by public officers under sanction of law, such as tax lists, tax deeds, &c., when offered in evidence. *Lumsden vs. Cross.* 282

See AGENT AND PRINCIPAL, 7.
LIBEL, 1, 2.
NEW TRIAL, 1, 2, 3, 4.
PARTITION, 8.
PUBLIC LANDS, 1.

EXECUTION.

See CAPIAS, 1, 2, 3, 4.
EJECTMENT, 1, 2, 3.

F

FACTOR.

See AGENT AND PRINCIPAL, 3, 4, 5.

FEES.

See MORTGAGES, 2.

FINDING.

1. Where a trial is had before the court, without a jury, the finding of the court must be as broad as the verdict of a jury should be in the same case, or no judgment can be sustained thereon. *Bates vs. Wilbur.* 415

2. A finding in an action of replevin, which does not fix the damages for the detention is fatally defective, and will not support a judgment in the cause. *id.*

3. A finding in an action of replevin, which does not find and determine the right of possession, will not support a judgment for the possession. *id.*

FORMER SUIT.

1. What effect will be given to a decree dismissing a bill in equity on the plaintiff's motion, or on the application of the defendant for want of prosecution, when such decree is set up in bar to a subsequent suit at law for the same cause of action between the same parties. Quere. *Babb vs. Mackey.* 371

2. To a plea in bar, that a bill had been filed in equity for the same cause of action, that a feigned issue had been tried and verdict found for the defendant, and that after verdict the plaintiff's bill had been dismissed, the plaintiff replied that the bill was dismissed on his motion, upon his paying the costs to be taxed; but did not aver that the costs were taxed or paid; this was a material defect, and the replication was demurrable for want of such averment.

FORECLOSURE.

See MORTGAGES, 1, 2, 3, 4, 5, 6, 8 11, 12.

FRAUDS.

1. If S. suffers his goods to be so mingled with those of C. that an officer having a writ against the goods of C., cannot distinguish them, but takes all the goods, then S. cannot maintain an action against the officer who has seized them, until notice, and demand and refusal. *Smith vs. Welch et al.* 91

2. The question before the court, was fraud in C. in making a sale of goods, to S., and retaining possession until a creditor of C. had levied upon them; and the court refused to instruct the jury, that if they should find the sale to have been made in good faith, and to pay a *bona fide* debt, then the question of the possession of the goods did not enter into the case at all. Held, that such instruction was properly refused. *id.*

3. The law always presumes in favor of innocence and against fraud. It will never infer evil intentions and dishonest purposes from language or conduct which is susceptible of upholding those which are good and honest. *Norton vs. Kearney et al.* 443

4. W. had a contract for the sale of real estate, and paid considerable of the pur-

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chase money, when the vendor sold the land to S., W. then obtained a decree for specific performance, afterwards a judgment creditor of the vendor levied an execution upon the same land, and sold it, becoming a purchaser, and then assigned to S.; but the execution, sale and assignment were intended to defraud W. out of his purchase money: Held, that such a sale would be set aside upon the motion of W. as being in fraud of his rights. *Wiggins vs. Silverthorn.* 492

See ASSIGNMENT, 3, 4.

FRAUDS, STATUTE OF.

1. It is improper for the court to refuse to instruct the jury in relation to a verbal contract, "that if they believed that no time was ever agreed upon between the parties for the completion of a contract, then the statute of frauds did not apply." And this error will not be cured, though the court in its charge do instruct properly in the law, unless it also appear that the refusal did not prejudice the party asking the instruction. *Rogers vs. Brightman.* 55

2. A contract to be within our statute of frauds, must show by its *terms* that it is not to be performed within the year, and it is not enough to show that by mere possibility it might not be. *id.*

3. Where W. sold lime to K. to construct a building for M., and after the sale M. promised to pay W. for the lime, such promise is not binding on M., unless reduced to writing, with a consideration expressed. *McDonald vs. Dodge.* 106

4. Where G. was indebted to S., and C. was indebted to G., and it was agreed between C. and S., with the assent of G., that C. should pay S. the amount he was owing G., and S. should give G. credit for the sum paid by C.: Held, that an action could be maintained on this promise of C., and it was not a promise to answer for the debt of another, but was a promise by C. to pay his own debt in a particular way. *Cotterill vs. Stevens.* 422

5. Where G. had pine logs of the value of $1,000 lying loose in lake Poyagan and Wolf river, and sold them to C. as they lay, C. to hunt them up, and C. agreed to pay for them by paying a debt due from G. to S., and S. took C. as his paymaster, and then commenced an action against C.: Held, that C. could not set up as a defence that the logs were worth more than $50, and the contract to buy was not in writing, nor was there a delivery of the logs; the delivery was a good one, and the agreement to pay S., was a payment for the logs. *id.*

FRIVOLOUSNESS.

1. An agreement to pay money in the form of a promissory note, except adding the words "with exchange on New York," is a contract for the payment of money only, and may be declared on as such. A demurrer to the complaint for the reason that it is not such a contract, will be declared frivolous. *Leggett vs. Jones.* 34

2. An answer which avers that the note on which the action is brought, was made payable in Minnesota, for the express purpose of evading the usury laws of this state, and also avers the usury, will not be declared frivolous, on a motion for judgment for that reason. Such an answer is not so clearly untenable and insufficient, that the court could determine its character upon inspection, without argument or research. *Moyer vs. Strahl.* 83

3. Where a notice of application for judgment under section 159 of the Code, for frivolousness of the answer, was given for the 25th of May, at the opening of the court on that day, &c.; and on that day the court was not in session, the application may be made on the next motion day, without further notice. *Platt vs. Robinson.* 128

4. The court may refer a note and mortgage to a referee to compute the amount, &c., before entering judgment under section 159 of the Code, and it is not necessary that notice of the time, &c., when the referee will examine and compute the amount, need be given to the defendant, whose answer has been declared frivolous. *id.*

5. Where judgment has been ordered on motion for the frivolousness of a demurrer, no assessment by the clerk of the amount due is necessary, if the complaint be verified. *Cahoon vs. Central R. R. Co.* 290

6. So where judgment has been ordered on motion for the frivolousness of a demurrer, no affidavit of want of answer is required. Such a judgment is not founded on the want of an answer, but upon an issue of law found for the prevailing party. *id.*

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7. To constitute a pleading frivolous, it must be apparent on a mere inspection, without examination or research, that it is utterly invalid. *id.*

8. Whether a party who writes his name on the back of a promissory note before delivery, is liable to the payee as indorser, is not so well settled, that a demurrer to a complaint showing such a state of facts, will be deemed frivolous. *id.*

G

GOODS SOLD AND DELIVERED.

Where S. sold a stock of goods to M., taking a mortgage as security for his pay on the goods, and after forfeiture M. redelivered the goods to S. with other goods originally belonging to M., from which last S. was to receive enough to replace any deficiency which on taking an inventory might be found in the stock sold by S., and return the balance to M.; but, before completing the inventory, the sheriff levied upon the whole stock by virtue of an execution issued against M., and took them from the possession of S., who brought replevin against the sheriff for taking the goods, &c: Held, that as to that part of the stock sold to M., S. took an absolute title without any further act on the part of either party; but as to that portion originally belonging to M., and from which S. was to make up the deficiency after taking the inventory, the title would not pass until the inventory was completed. *Sanborn vs. Hunt.* 436

GUARDIAN.

A judgment entered after verdict will not be reversed for an error committed in the appointment of a next friend to prosecute the action. *Haffern vs. Davis.* 501

I

IMPRISONMENT FOR DEBT.

See CAPIAS, 1, 2, 3, 4.
EJECTMENT, 1, 2, 3.

INDORSER.

Whether a party who writes his name on the back of a promissory note before delivery, is liable to the payee as indorser, is not so well settled, that a demurrer to a complaint showing such a state of facts, will be deemed frivolous. *Cahoon vs. Central R. R. Co.* 290

INJUNCTION.

Where the taxes on the lands of W. have been illegally increased by reason of the illegal exemption of other lands from taxation, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax. *Weeks vs. City of Milwaukee.* 242

INSTRUCTIONS.

1. The question before the court, was fraud in C. in making a sale of goods, to S., and retaining possession until a creditor of C. had levied upon them; and the court refused to instruct the jury, that if they should find the sale to have been made in good faith, and to pay a *bona fide* debt, then the question of the possession of the goods, did not enter into the case at all. Held, that such instruction was properly refused. *Smith vs. Welch et al.* 91

2. If S. suffers his goods to be so mingled with those of C. that an officer having a writ against the goods of C., cannot distinguish them, but takes all the goods, then S. cannot maintain an action against the officer who has seized them, until notice, and demand and refusal. *id.*

3. Where the charge of the court is generally correct, and if a party desire a particular charge given, it is necessary to ask the court to give the instruction desired, or to call the attention of the judge to it; and unless this be done, the appellate court will not notice the neglect. *Chappell vs. Cady.* 111

See CHATTEL MORTGAGE, 2.
TRESPASS, 2.

INTEREST.

1. Whether a contract to pay money on a given day, and which also provided that if the payments were not made on that day, then interest at 24 per cent. per annum, until paid, is legal interest and should be allowed. Quere. *Boyd vs. Sumner et al.* 41

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2. If the principal debtor has acquiesced in a judgment to pay more than legal interest, a subsequent incumbrancer cannot complain of the judgment, unless he also shows that he has sustained injury thereby. *id.*

3. An answer to a complaint for foreclosure which set up that the note on which the action was brought was usurious, but did not aver an offer to pay the amount borrowed, nor tender the same with the answer, is not for that cause frivolous, but such answer is a good defense to the action, and it is error in the circuit court to enter judgment upon such an answer, under section 159 of the Code. *Platt vs. Robinson.* 128

4. Where a defendant answered that the note on which the action is brought is usurious under section 2, chap. 55, 1856, the defendant is not obliged to prove a tender of the amount of the principal sum loaned, &c., until it has been determined that the facts of usury set forth in the answer are true, and the defendant shall demand the benefit of the determination. *id.*

5. Under the first section of the usury statute of 1856, the security was valid for the repayment of the principal sum loaned, but void for the interest reserved. *Rock River Bank vs. Sherwood.* 230

6. The interest on a usurious contract may be recovered, unless the defendant by his pleadings set up the usury as a defense, and apply to the court for the relief given by the usury act, and make and prove the tender of the principal as required by the statute. *id.*

See BANKS, 1, 2, 3, 4, 5.
USURY, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.

J

JUDGMENT.

1. S. obtained a judgment before a justice of the peace, against G. & S., from which they took an appeal to the Circuit Court; held that such appeal, under the Code, only stays the execution, and does not prevent S. from filing and docketing a transcript of the judgment, in the office of the Clerk of the Circuit Court to create a lien on real estate. *Steckmesser vs. Graham et al.* 37

2. Where a justice of the peace sent the appeal papers to the Circuit Court of Jefferson county, when they should have been sent to Dodge county; this does not deprive the appellant of the right to have them sent to the proper court; nor does he lose his appeal thereby. *id.*

3. An assignee for the benefit of creditors, may attack the validity of a judgment entered upon the confession of his assignor. *Nichols. vs. Kribs et al.* 76

4. A confession for a judgment which states that the defendant purchased of the plaintiff in the month of March, 1857, a large quantity of goods and wares, in New York, to the amount and value of $1,916, at six months' credit from the 21st of March, and received the goods, &c., and there is now due said plaintiff the sum $1,090, &c., does not sufficiently state the facts upon which the indebtedness arose, to authorise the judgment to be rendered; and such a judgment will not protect the sheriff in making a levy upon the property of the defendant in the hands of his assignee. *id.*

5. Section 27, chap. 132, authorizes clerks of the court to enter up judgments in vacation, in the absence of the judge, and without his order or direction, upon filing with him proof of the existence of one of the causes for judgment therein specified. PAINE, J., dissenting. *Wells vs. Morton.* 468

6. The judgment entered in vacation, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, the act and determination of the court itself. *id.*

7. In an action upon a penal bond, the summons and judgment should be for the amount of the penalty; but the execution can only issue for the amount actually due. *Warren vs. Gordon.* 499

8. In an action upon such bond, the summons was for *relief*, and the complaint, a copy of which was served therewith, demanded the appropriate judgment for the penalty, and judgment by default was entered for the damages assessed, which were less than the penalty. Held, that such judgment would not be reversed on appeal, the irregularities complained of

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affecting no substantial right, were cured by statute. *id.*

See FRIVOLOUSNESS, 4, 5, 6.
PLEADINGS, 5, 6.
REPLEVIN, 3, 4, 5.
WARRANT OF ATTORNEY, 1, 2, 3, 4, 5, 6.

JURISDICTION.

1. Where a creditor's bill showed that judgment had been entered and execution issued thereon, which were confessed in the answer, it is not competent for the defendant to show that no such judgment had in fact been entered, and thus deprive the court of jurisdiction of the case. *Wanser vs. Howland.* 8

2. If a court have jurisdiction of the subject matter generally, and whether it has in the particular case, depends upon some fact to be tried; and if that fact be established by a confession in the pleadings, then the jurisdiction has attached, and the parties are estopped by their pleadings to inquire into the fact of jurisdiction. *id.*

3. If a party admits a cause of action set up against him, in a suit before a court authorised to render judgment for that cause of action, such admission does not confer jurisdiction by consent upon the court, even though the cause of action did not exist, but simply admits by the pleadings, facts which it would otherwise have been necessary to establish by evidence, in order to show that the cause of action existed; and the existence of such fact being established, whether by the pleadings, or by proof, the judgment can not be attacked on the ground that the jurisdictional fact did not exist at the time. *id.*

4. If a court should decide that it has power to try a cause and render a judgment, where by law it has no such power, that decision does not give the power; but the judgment may be questioned in any other court. There is a clear distinction between the finding of a jurisdictional fact, and the decision of a court, that as a matter of law, it has jurisdiction over a cause of action, when the jurisdiction does not exist. *id.*

5. When allegations in a cause of action are so made that the court has authority to proceed and try them, and to render judgment according to its finding, then it has jurisdiction of the subject matter, not otherwise. *id.*

6. Where in an action of trespass upon lands pending before a justice of the peace the defendant pleaded a right of pre-emption to the premises in question, under the act for the protection of the swamp and overflowed lands, and to grant pre-emption to the same, and also gave the bond required by law. Held, that such a plea ousted the justice of jurisdiction of the cause, and it must be sent to the circuit court for trial. *Manny vs. Smith et al.* 509

7. Under the act, the right of pre-emption in the swamp and overflowed lands, vests such a title to the lands in the pre-emptor, as will maintain ejectment, or any other action to recover possession of the lands. *id.*

8. Where a party contracted for the purchase of real estate, and paid a part of the purchase money, the vendor agreeing to convey by "a warranty deed," upon the payment of the whole; but afterwards the vendee discovered that the vendor had not a perfect title, and so refused to pay the balance of the purchase money and brought an action to recover the amount paid: Held, that the action may be maintained; and the vendee was not obliged to demand or accept a deed which would not convey to him a perfect title to the land. *Falkner vs. Guild.* 563

9. Where lands were sold upon an execution in a partition suit; and in an action involving the validity of the sale it appeared that the court did not render the preliminary judgment required by law, but did appoint commissioners, and receive and confirm their report, and enter final judgment: Held, that though the want of the preliminary judgment was an irregularity, and sufficient cause for reversing the final judgment on a direct proceeding for that purpose; yet it does not make the judgment void, so that it can be impeached collaterally. *id.*

10. Where proceedings are in a court of general jurisdiction, and jurisdiction appears by the record, even though it does not show everything necessary to regularity, yet it will be presumed, unless the contrary expressly appear; and even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. This rule applies as well to proceedings under special statutes as under the common law. *id.*

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11. The act of partition required that a copy of the petition should be served *at least forty days* before the term at which it should be presented, on all the parties not joining in the petition, with a notice that an application would be made on a day certain in term time; and in proceedings under this act, the notice stated that an application would be made to the judge for the appointment of commissioners to make the partition; but stated no time when, nor where, the application would be made; and therefore fails to comply with the requirements of the statute; and the notice and petition were filed in less than forty days after service, and the commissioners appointed: Held, that such a notice did not confer such jurisdiction over the parties, as would enable the court to enter a personal judgment against the defendants. *id.*

12. Where the act required the absent defendants to be brought into court by publication, and publication being commenced in a newspaper, and being continued for a part of the time required, the newspaper was discontinued, and the notice was then posted on the court house door for the balance of the time: Held, that such publication was not a compliance with the statute, and did not give the court jurisdiction of the absent defendants. *id.*

See COSTS, 1, 2.

JURY.

See TAXES, 14.

JUSTICE OF THE PEACE.

1. S. obtained a judgment before a justice of the peace, against G. & S., from which they took an appeal to the circuit court. Held, that such appeal, under the Code, only stays the execution, and does not prevent S. from filing and docketing a transcript of the judgment, in the office of the clerk of the circuit court, to create a lien on real estate. *Steckmesser vs. Graham.* 37

2. Where a justice of the peace sent the appeal papers to the circuit court of Jefferson county, when they should have been sent to Dodge county, this does not deprive the appellant of the right to have them sent to the proper county; nor does he lose his appeal thereby. *id.*

3. In actions commenced before justices of the peace, parties will not be held to strict rules of pleadings, unless they resort to written pleadings, in which cases the pleadings must contain all necessary substantial averments. *Fobes vs. School District.* 117

See COSTS, 1, 2.
JURISDICTION, 6, 7.

L

LIBEL.

1. Evidence of the existence, at and before the time of the publication of a libel, of common rumors and reports, to the effect that the plaintiff was guilty of that with which he was charged in the libel, which rumors and reports were before the publication communicated to the publisher, are inadmissible in mitigation of damages in an action of libel, where the libel does not state or refer to such rumors or reports, or refer to them as authority for the publication. *Haskins vs. Lumsden et al.* 359

2. Reports and rumors, if received in evidence in an action of libel, must be received either in diminution of damages, by showing the plaintiff's previous character to have been bad, or to repel the presumption of malice on the part of the defendant. *id.*

LIEN.

1. The lien of the mechanic, lumberman, &c., for work and materials, is a personal right, and cannot be transferred or assigned, so as to enable the assignee to prosecute the claim in his own name, and avail himself of the benefit of the lien given against the building. *Caldwell vs. Lawrence.* 331

2. The right of a party having a claim against a boat or vessel; for which he may sue the vessel itself, under the boat and vessel act, is not cut off, if before he sues, but within the time in which by the act he was entitled to sue, the boat is sold on an execution issued on a personal judgment against the owner. *Hay et al. vs. Steamboat Winnebago.* 428

3. The sale of a boat or vessel by the owner, on an execution against the owner,

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does not divest such boat or vessel of the capacity to owe or be bound for a debt, and to be sued for the payment of the same. *id.*

See AGENT AND PRINCIPAL, 1, 2, 3, 4, 5. BOATS AND VESSELS, 3, 4, 5, 6.

LIMITATIONS.

1. A county order is a simple contract, and an action upon it is barred by the statute of limitations, in six years from the date of presentation for payment. *Pelton vs. Supervisors, &c.* 69

2. Although an action be barred on a county order, by the statute of limitations, still it is available to the holder, to the amount of its face, in payment of county taxes, under the provisions of the tax laws. *id.*

3. The state may plead the statute of limitations to an action against it, and is entitled to this defense the same as any other defendant. *Baxter vs. The State.* 454

See BOATS AND VESSELS, 3, 4, 5, 6.

M

MANDAMUS.

1. A motion to quash an alternative writ of mandamus will be granted unless the relation show a clear right to the writ. *State ex rel. Carpenter vs. Hastings.* 518

2. Where the relation for a mandamus leaves the right of the relator in doubt, and the writ is quashed for that reason, leave will be given to amend. *id.*

MILLS AND MILL-DAMS.

1. When the Supreme Court of the state had decided that the "act concerning mills and mill dams," was constitutional, and rights and interests have grown up and become vested under the law as then construed by the court, the court will now adhere to that ruling, although all its members may be of opinion, if it were a new question, that the decision should have been against the constitutionality of the act. *Fisher vs. Horicon Iron and Manufacturing Co.* 351

2. A corporation is a person within the meaning of the mill dam act, and entitled to the rights granted under its provisions, as a franchise, and can claim the protection of the act. *id.*

3. The act of February 26th, 1858, authorizing the construction of a dam across the Baraboo River, at Reedsburg, is sustained as constitutional, in accordance with the decisions upon the mill dam law. *Babb vs. Mackey* 371

MORTGAGES.

1. After the act allowing a non-resident to come in, by petition, and defend in a chancery case, and that the petition should operate to set aside a sale of mortgaged premises, had been repealed, the rights of the defendant to set aside the sale are extinguished by the repeal; and the defendant can only pursue his remedy against the proceeds of the sale. *Power vs Catlin et al.* 26

2. It is competent for parties to contract for a reasonable amount as solicitor's fees in the foreclosure of a mortgage, and such agreements will be enforced by the courts. In such case the court should refuse to tax a statute fee for the solicitor. *Boyd vs. Sumner.* 41

3. Where the owner of a first mortgage, who had been made a party defendant in an action to foreclose a second mortgage, and charged as a subsequent incumbrancer, and an order *pro confesso* taken against him, entered into a written stipulation with the plaintiff, to allow the latter to go on and sell under his decree, without prejudice to his right, and that he might file his answer and present his defense, as though no order *pro confesso* had been entered against him; and such defense is found in his favor: Held that the plaintiff has thereby waived all right to insist upon the decree and sale as a bar to his prior claim. *Clason vs. Shepherd et al.* 356

4. The agreements of parties litigant will be carried out by the court, even though it do cause irregularity in the form of entering the judgment in the cause. *id.*

5. Though a party to a foreclosure suit, holding a prior mortgage, stipulate that a sufficient sum of money to satisfy his claim be considered as in court, and that the plaintiff may go on and sell the prem-

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ises, such a stipulation does not debar the prior mortgagee of his right to proceed to judgment, nor release his lien upon the mortgaged premises. *id.*

6. Where upon foreclosure of a mortgage upon an instalment due and unpaid, and other instalments are to become due, the judgment is for the whole amount due and to become due, and absolute for the sale of the mortgage premises, and omits to provide that, if previous to such sale, the defendant should pay the complainant, or bring the money actually due on the mortgage, with interest and costs, into court, the proceedings should be stayed; the judgment was reversed for that reason. *Sauer vs. Steinbauer.* 370

7. Where L. a mortgagor, made a contract with an agent of H., the mortgagee, to borrow money in the hands of the agent belonging to J., for the purpose of satisfying the mortgage, and to secure the payment thereof, L. was to make another mortgage on the same lands in favor of J.; the new mortgage was prepared and placed in the hands of P, who had made the negotiation, in order to procure its execution by L., which he did, and delivered it to the agent of H., and thereupon the agent recorded the new mortgage to J., and also satisfied the old one. But at the time P. had the new mortgage in his possession, he also had an unrecorded mortgage made before then by L. to G., upon the same lands, but did not disclose its existence: Held, that P., was not such an agent of J. as to make his knowl- of the existence of the mortgage of G. binding upon J., and thus give preference to the mortgage of G. over that of J. *Jamison vs. Gjemenson.* 411

8. A subsequent incumbrancer cannot object to a judgment entered by foreclosure against his vendor, that it was improperly entered, unless he also show that the premises will not on a sale be sufficient to pay the judgment as rendered and the subsequent incumbrance. *id.*

9. Chapter 220, Laws of 1859, which repealed the act of 1858, chapter 113, did not abate suits commenced and pending under it at the time of the repeal, nor affect them, except as to the time when the defendants were to be considered in default, and the time in which lands should be advertised for sale. *Beebee vs. O'Brien et al.* 481

10. This case is to be distinguished from the repeal of a statute creating a cause of action, or remedy, or conferring jurisdiction where it did not before exist. *id.*

11. The act of 1858 provided only for the mode of conducting proceedings in foreclosure actions, after they have been commenced in the manner there directed; otherwise the proceedings were all conducted under and by the code of procedure; and the repeal of the act did not affect the provisions of the code in relation to the actions pending at the time of the repeal. *id.*

12. Where a party had commenced a foreclosure of a mortgage under a statute which required the defendant to answer in six months, and before that time expired, and after the defendants had entered their appearance in the cause, the statute was repealed, thus leaving no statute or rule of court prescribing the time in which the answer should be put in; such repeal does not abate the suit, but the plaintiff may serve a notice on the defendants to show cause, and on their neglect to answer, or show cause, judgment will be entered by the court as for a default. *Cornell vs Skinner et al.* 487

See CONSTITUTIONAL LAW, 1, 2.
ORDERS, 1, 2.
PARTITION, 2, 3, 4, 5, 6, 7, 8.
REFERENCE, 1, 2.

N

NEW TRIAL.

1. An appeal from an order refusing a new trial, upon the ground that the verdict was contrary to law and evidence, does not bring up for the review of the supreme court any error of the judge in refusing instructions asked for. *Smith vs. Welch et al.* 91

2. Where a party to a cause of action relied on the evidence of the opposite party, but took no steps to secure his attendance, and when the cause was called for trial the latter party, who had been in attendance on the court, suddenly disappeared, and the trial proceeded without his evidence, the court will not, for that cause, set aside the verdict and grant a new trial. *Kellogg vs. Ballard.* 440

3. A motion for a new trial cannot be made upon the minutes of the judge taken

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on the trial at a previous term of the court, under section 16, chap. 132, R. S., such motion is restricted to the term at which the trial took place. *Dunbar vs. Hollingshead.* 505

4. A party seeking a new trial on the ground of newly discovered evidence, must produce the affidavits of the witnesses themselves, or satisfactorily show why he cannot do so. *id.*

See BILLS OF EXCEPTIONS, 8.

NEXT FRIEND.

See GUARDIAN, 1.

NUISANCE.

1. Where a tax has been illegally assessed on the lands of W. for the purpose of abating a nuisance created by the taxing power on the same lands, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax. *Weeks vs. City of Milwaukee.* 242

2. Where the city of Milwaukee had taxed the lots of W. to abate a nuisance created by the act of the city in the construction of streets, so as thereby to cause the water to stand upon the lots: Held, that the city has not the power to levy a special tax on the same lots to pay for filling them up so as to prevent the water from standing there; and such tax if levied is illegal. *id.*

See WATER COURSE, 1, 2.

O

OFFICES.

The act of 1854, providing that the terms of office of judicial officers shall commence on the first Monday of each year, next after their election, does not apply to the justices of the supreme court. Their terms of office commence on the first day of June succeeding their election. COLE, J., dissenting. *State vs. Hastings.* 525

ORDERS, &c.

1. After a sale of mortgaged premises by a referee, the circuit court, on the application of the mortgagor, ordered a resale of the mortgaged premises, and imposed other terms than the payment of the costs of the motion; *held*, that if the terms imposed are reasonable and just, the order of the circuit court will be affirmed. *Adams vs. Haskell.* 123

2. The rule of the English courts of chancery, that before the court will open a sale, there must be an offer of a reasonable advance upon the amount bid at the sale, does not obtain in this State; but it rests in the sound discretion of the court. *id.*

3. Where an appeal is taken from an order "denying a motion made to set aside, and strike from the file the judgment roll," and the record showed no such order was made by the circuit court, the appeal will be dismissed. *Kellogg vs. Smith.* 135

See BILLS OF EXCEPTIONS, 4, 5, 6, 7.

P

PARTITION.

1. Upon a complaint for partition against certain persons named, and others as unknown owners, and publication of notice pursuant to the statute, a person in possession claiming to hold a part of the land in severalty, and by a title paramount to that of the parties actually named in the proceedings, and who was not named as a party, and had no actual notice of the commencement or pendency of the proceedings, is concluded by the judgment, "as an unknown owner," there being no evidence of fraud or collusion in the commencement of the action, or procuring of the judgment; and his title is bound thereby. *Nash vs. Church et al.* 308

2. Where S. was indebted to C. and made a trust deed of lands to F., conditioned that if S. paid his indebtedness to C. by a certain day, then F. should reconvey the lands; but if S. did not pay C., then F. should advertise and sell the lands pay C. and return the surplus money to S.: Held, that this deed could not be regarded or sustained as a mortgage, nor could it be foreclosed by advertisement and sale under the statute. *Marvin vs. Titsworth.* 320

3. A mortgage is the conveyance of lands by a debtor to his creditor, as a

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pledge or security for the payment of a debt, and to become void on payment. *id.*

4. A deed to a trustee conditioned that if the grantor did not pay a debt due from him to a third party, then the trustee should advertise and sell the lands, pay the debt and return the surplus money to the grantor, does not constitute a mortgage. The trustee is the mere agent of both parties, and such a trust being prohibited by our statute, the legal title remains in the grantor. *id.*

5. The test whether a conveyance is a mortgage, or a trust, is to be determined by the question, whether the trust is to be executed by the creditor or a third party; if by the former, it is a mortgage; if by the latter, a trust. *id.*

6. A conveyance to a trustee conditioned, that if the grantor does not pay a debt due from him to a third party, the trustees should advertise and sell the lands, pay the debt and return the surplus money to the grantor, was not authorized by chap. 57, § 11, R. S., 1849, authorising the creation of express trusts to sell lands for the benefit of creditors, because the conveyance was conditional and not absolute, and provided for a reconveyance to the grantor, instead of an absolute sale for the payment of the debt. *id.*

7. A sale of lands, without the aid of a court of equity, was made by the trustees named in a conditional deed of trust, which was not authorized by law: Held, that the purchaser acquired no title under such sale, against the grantor in the deed or his assigns. *id.*

8. A judgment in a partition suit, where the proceedings were regular, under the statute, is conclusive as to the title of the premises, as against all who are made parties by name; and where the proceedings are against "unknown owners," as against all the world. *id.*

See Court Commissioner, 1.
Jurisdiction, 9, 11.

PARTNERSHIP.

1. Where a surviving partner has mixed the goods of the firm with his own, sold them together and kept no separate account of the sales, and used the proceeds for the support of himself and family, such conduct is an abuse of his trust; and the court will grant an injunction against him, appoint a receiver of the assets of the partnership, and direct an account. *Administrators of Jennings vs. Chandler.* 21

2. If the survivor desires to retain possession of the partnership property, and continue the business, he may do so upon giving security to account for the assets of the firm, apply the proceeds to the payment of the firm debts, and pay over the surplus to the representatives of the deceased partner. *id.*

3. An administrator is entitled to inquire into the condition of a copartnership between the deceased and another, even though the firm is declared insolvent, in order to reduce the indebtedness as much as possible, and for that purpose may maintain an action against the survivor. *id.*

4. In an action commenced by a surviving partner, it is not competent for the defendant to prove by his own oath, what the contract made with the deceased partner was. As to the survivor the deceased stands in the relation of a deceased agent. *Rogers vs. Brightman.* 55

5. Where several partners made an assignment of their joint property, and afterwards one of the partners unlawfully obtained possession of a portion of it, and converted it to his own use, he may be arrested for such cause of action, and held to bail under the code. *Illsley vs. Harris.* 95

PLEADING.

1. If a complaint is not sufficiently certain, the remedy is not by demurrer, but by motion to have the same made more definite and certain. *Markwell vs. Supervisors, &c.* 73

2. When the complaint is insufficient, the court will, on a proper application, grant an amendment so as to let in the testimony necessary to the maintenance or defense of an action. *Fobes vs. School District.* 117

3. Where an action is several in its nature, so that there may be a different defense to each of the parts. The plea which answers but one of the parts, is not bad because it does not answer the whole of the declaration or count containing the separate parts of the cause of action. One of the parts may be answered in one plea, and others in another. *Babb vs. Mackey.* 371

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4. The spirit of the code, § 10, sub. 4, as well as condusiveness to justice, require parties to apprise each other of the precise grounds upon which they rely. *id.*

5. A declaration in assumpsit, which averred that the defendant sold goods, &c., to the plaintiff, is so defective in substance, that no judgment can be entered upon it. *Harris vs. Harris.* 467

6. Where a declaration contains no allegations of facts, showing a cause of action, it will not be cured by verdict; the presumption being, that nothing is proved except what is alleged or necessarily implied from the allegations. *id.*

See JURISDICTION, 1, 2, 3, 4, 5.
USURY, 6, 7, 8, 9, 10, 17, 18.
WARRANT OF ATTORNEY, 2.

PRACTICE.

1. If an answer is indefinite and uncertain, the remedy under the code is by motion to make it more certain, and not by demurrer. *Bateman vs. Johnson.* 1

2. If a party to an action desire the supreme court to review the testimony, to see if it supported the conclusions of the court below upon the facts, he should cause a case to be made, or bill of exception settled, embracing the testimony; otherwise, the facts will not be re-examined, even in an equity case. *Davidson vs. Davidson.* 86

3. A certificate of the judge who tried the cause that the printed case contains copies of the complaint, answer and evidence produced in the court, &c., cannot be used as a substitute for a case or bill of exceptions. *id.*

4. In general, no appeal will lie to this court, upon a conviction for contempt; but section 13, chap 155, R. S. 1858, has excepted a sheriff from this rule. *State vs. Giles.* 101

5. The court below has power to set aside a sale, and also a confirmation of the sale by the court, upon a proper application, made for that purpose. *Starkweather vs Hawes et al* 125

6. Proceedings in suits against the state are to be conducted in accordance with the provisions of the code, except so far as the law allowing these actions to be brought may otherwise specially provide. *Baxter vs. The State.* 454

7. The judgment entered in vacation, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, the act and determination of the court itself. *Wells vs. Morton.* 468

See APPEAL, 8, 9.
BILL OF EXCEPTIONS, 8.
FRAUDS, 4.
FRIVOLOUSNESS, 3, 4, 5, 6, 7, 8.
INSTRUCTIONS, 3.
JUDGMENT, 5, 6, 7, 8.
MANDAMUS, 1, 2.
MORTGAGES, 10, 11, 12.
PRE-EMPTION, 1.
REFERENCE, 1, 2, 3, 4.
WARRANT OF ATTORNEY, 1, 2, 3, 4, 5, 6.

PRE-EMPTION.

On the trial of an appeal from the commissioners to grant pre-emption to swamp lands, the claimant offered in evidence the affidavit required by law to be filed, for the purpose of showing that he had complied with the statute, but did not read its contents: Held, that the opposite party was at liberty to read the whole of the affidavit, to shew that it did not correspond with the case made by the proof on the trial. The affidavit constituted a part of the record of the case, and the parties have a right to use it, to see what the claim is. *Hasler vs. Schumacher.* 419

See JURISDICTION, 6, 7.

PRINCIPAL AND AGENT.

See AGENT AND PRINCIPAL.

PRIORITY.

See MORTGAGES, 7, 8.

PROMISSORY NOTES.

An agreement to pay money in the form of a promissory note, except adding the words, "with exchange on New York," is a contract for the payment of money only, and may be declared on as such. A demurrer to the complaint for the reason that it is not such a contract, will be declared frivolous. *Leggett vs. Jones.* 34

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PUBLICATION OF LAWS.

1. Where the charter of a city empowered the common council, by an ordinance, to submit to the voters of the city, the question whether the city should subscribe for stock in a railroad, and issue its bonds, and that ordinances be published before taking effect, &c.; and the ordinance authorizing the submission and the notice of the election, were both contained in the same newspaper; held, that such notice was legally published. *Clark vs. City of Janesville.* 136

2. The charter of the city of Janesville is a general law, within the provision of Art. VII., § 21, of the constitution of Wisconsin, which requires that "no general law shall be in force until published." The words, "general law" as here used, have the same meaning as *public act*, in the ordinary acceptation, and they are convertable terms. (COLE, J., dissenting.) *id.*

3. The words "general law," in §§ 1 and 4, Art. XI., of the constitution, are clearly used as opposite to *special*, and without any design of indicating the public or private character of the law. The whole object and scope of the restriction are aimed at special legislation. (COLE, J., dissenting.) *id.*

4. In § 21, Art. VII., the words "general law," are not used as contra-distinguished from local or "special," but they are used in their usual meaning of public. (COLE, J., dissenting.) *id.*

5. A publication of an enactment of the legislature in an unauthorized manner, although it may give notice to the people to be affected thereby, is not such a publication as is required by the constitution to give it efficacy. *id.*

6. The charter of the city of Janesville, authorizing a vote to be taken on the question of issuing bonds to aid in the construction of a railroad, was published in the private acts, and the certificate of publication attached to the volume was dated October 4, 1853; Held that the charter was first published by authority at the date of the certificate, and that it did not authorise the common council to pass an ordinance, and the people to vote on the question in July, nor the counsel to issue the bonds in August, previous to the authoritative publication. Every person taking these bonds, is chargeable with a knowledge of this want of authority. (COLE, J., dissenting.) *id*

PUBLICATION OF SUMMONS.

See SUMMONS, 1, 2.

PUBLIC IMPROVEMENT.

See ASSESSMENT, 4, 5, 6, 7.

PUBLIC LANDS.

Courts will take notice of the legal subdivisions of sections without a designation of boundaries to lands, by posts, stones, or other monuments. *Marvin vs. Titsworth et al.* 320

See PRE-EMPTION, 1.

PUBLIC OFFICER.

See SCHOOL DISTRICTS, 1, 2.

R

REFERENCE.

1. Where a referee appointed by the circuit court to make sale of mortgaged premises, &c., performed the services, and presented his bill of fees, and upon a disagreement with him and the counsel of the party from whom he claimed, it was stipulated to submit the question of disagreement to the circuit judge, who decided that the amount charged was too large, and gave the referee a smaller sum, from which the referee appealed to this court; Held that the decision was not an appealable order; and the appeal must be dismissed. *Lansing's Appeal.* 120

2. Where parties submit a matter in dispute to the circuit judge for his decision, the judge, in such case acts only as an arbitrator; and although the decision will bind the parties to it, yet it cannot be reviewed on appeal or writ of error any more than the decision of any private individual, to whom the same matter had been submitted. *id.*

3. Where a notice of application for judgment under section 159 of the code, for frivolousness of the answer, was given for the 25th of May, at the opening of the

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court, on that day, &c.; and on that day the court was not in session, the application may be made on the next motion day, without further notice. *Platt vs. Robinson.* 128

4. The court may refer a note and mortgage to a referee to compute the amount, &c., before entering judgment under sec. 159 of the Code, and it is not necessary that notice of the time, &c., when the referee will examine and compute the amount, need be given to the defendant, whose answer has been declared frivolous. *id.*

REPEAL OF STATUTE.

It is competent for the legislature to repeal an act which has conferred a right on a party to have a decree of a court opened and reheard. *Power vs. Catlin.* 26

See STATUTE, REPEAL OF, 1, 2, 3, 4.

REPLEVIN.

1. The question before the court, was fraud in C. in making a sale of goods to S., and retaining possession until a creditor of C. had levied upon them; and the court refused to instruct the jury, that if they should find the sale to have been made in good faith, and to pay a *bona fide* debt, then the question of the possession of the goods did not enter into the case at all: Held, that such instruction was properly refused. *Smith vs. Welch et al.* 91

2. If S. suffers his goods to be so mingled with those of C. that an officer having a writ against the goods of C., cannot distinguish them, but takes all the goods, then S. cannot maintain an action against the officer who has seized them, until notice, and demand and refusal. *id.*

3. Section 328 of the Code, which provides that when a judgment is rendered against a party in an action of replevin, the judgment may be entered up, as well against the principal as against the surety who shall have signed the undertaking for a return of the property, is not in violation of the constitution, on the ground that it deprives the sureties of notice of the judgment and of the right of trial by jury. COLE, J., dissenting. *Platt vs. Donovan.* 378

4. A party who signs the undertaking provided for in section 328 of the code, as surety for the return of property replevied, thereby becomes *quasi*, a party to the suit then pending, and is liable to have judgment entered against him with his principal, upon a failure of the principal to sustain his cause. COLE, J., dissenting. *id.*

5. A judgment for the defendant entered in replevin under the code, is not erroneous, because it is not in the alternative for a return of the property or the value thereof, in case a return could not be had according to section 187; but the defendant may waive the return and take judgment for the value only. COLE, J., dissenting. *id.*

See FINDING, 1, 2, 3.
GOODS DELIVERED, 1.

S

SALES.

1. After a sale of mortgaged premises by a referee, the circuit court, on the application of the mortgagor, ordered a resale of the mortgaged premises, and imposed other terms than the payment of the costs of the motion: Held, that if the terms imposed are reasonable and just, the order of the circuit court will be affirmed *Adams vs. Haskell.* 123

2. The rule of the English courts of chancery, that before the court will open a sale, there must be an offer of a reasonable advance upon the amount bid at the sale, does not obtain in this state; but it rests in the sound discretion of the court. *id.*

3. The court below has power to set aside a sale, and also a confirmation of the sale by the court, upon a proper application, made for that purpose. *Starkweather vs. Hawes et al.* 125

SCHOOL DISTRICT.

1. A director of a school district can recover of the district the amount of necessary expenses which he may have been put to, or incurred, in the prosecution, or defense of a suit, brought by or against the district, of which he is an officer, and who is obliged by his office to appear on behalf of such district; but before he can maintain such suit, he must present his account to some district meeting, and give the voters an opportunity of acting upon

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it, and making provision for its payment. *Fobes vs. School District.* 117

2. Where a director of a school district commenced a suit before a justice of the peace, against his district, for expenses, and filed a written complaint, without averring that he had ever presented his account at any school district meeting, or district board, or given the voters any notice of his claim; held, that this complaint was wanting in a material averment, and it was not competent for the plaintiff, under it, to prove a notice to the district. *id.*

SECRETARY OF STATE.

1. If the Secretary of State allow a claim, which may in law be a proper claim, the court will not examine into it; but if he allows a claim against the law, his decision is not final. *State ex rel. Carpenter vs. Hastings.* 518

2. The act of May 17, 1858, providing for the appointment, and prescribing the powers and duties of a comptroller, and making it his duty to examine and pass upon all claims and accounts audited by the Secretary of State, and to countersign the same before they shall be paid by the State Treasurer, is in violation of the constitutional provision, which declares that the Secretary of State shall be "*ex-officio* auditor." The legislature cannot deprive an officer of power given him by the constitution, nor transfer it to another. COLE, J., dissenting. *State vs. Hastings.* 525

3. The deputy of the Secretary of State cannot perform the duties of auditor of state in place of the Secretary. It is a personal trust, and cannot be delegated. COLE, J., dissenting. *id.*

4. A certificate of the examination and allowance of an account made and signed by the deputy secretary of state, may be rejected by the treasurer on presentation for payment, and a mandamus will not be granted to compel its payment. COLE, J., dissenting. *id.*

5. Though the Secretary of State, in his capacity of auditor, is authorized to do all necessary acts connected with auditing accounts and claims against the state, and to certify them to the treasurer for payment, and although he is for that purpose the general agent of the state, it does not, therefore, follow that the treasurer is obliged to pay all claims audited by the secretary, when it is plain that he had no authority to allow the claim. *id.*

6. Public agents, who act in violation of their authority, that is, of public law, do not bind the public by such illegal acts; and all men are bound to take notice of the authority of such agents. *id.*

7. The act of 1858, relating to the assessment of taxes, and providing that the Secretary of State should prepare and print the *forms* necessary to carry the act into effect, and forward the same to the clerks of the boards of supervisors of the counties, who should cause to be printed for the use of the assessors of their respective counties, the necessary number of such blanks, did not authorize the Secretary of State to procure to be printed, 135,000 copies of such blanks, at the expense of the state; and the State Treasurer was justified in refusing to pay for such printing, even though the secretary had audited the same. *id.*

SPECIFIC PERFORMANCE.

In an action for a breach of a contract to convey real estate, it is a good answer, that a good and sufficient deed of the premises has been executed by the party in whom the legal title to the premises was, and tendered to the plaintiff, and he refused to receive it. *Bateman vs. Johnson.* 1

See CONTRACT, 1.

STATUTES, CONSTRUCTION OF.

1. The courts will construe statutes, as all written instruments are construed, by the surrounding circumstances, the condition of things, the evils to be remedied, and the objects to be obtained. Beyond these they will not go. *Clark vs. City of Janesville.* 136

2. Where the charter of a city empowered the common council, by an ordinance, to submit to the voters of the city, the question whether the city should subscribe for stock in a railroad, and issue its bonds, and that ordinances be published before taking effect, &c., and the ordinance authorizing the submission and the notice of the election, were both contained in the same newspaper: Held, that such notice was legally published. *id.*

3. Where the right of the common council to authorize the mayor of a city to

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subscribe for stock in a railroad company, depended on a vote of the electors of the city, and the bonds are issued, the presumption is, that the city authorities proceeded according to, and complied with all the provisions of law. (Per COLE, J. *id.*

4. If a city is authorized to subscribe for stock of a railroad company, and issue its bonds to the company for the stock, it cannot defeat an action on the bonds, on the ground that the company's charter did not authorize it to receive the bonds in payment for stock. The power to issue the bonds for the stock, carries with it the incidental power to receive them by the company, and issue the stock therefor, without an express authority in the company's charter for that purpose. *id.*

5. Though the charter of a railroad company only authorized it to receive subscriptions to its stock, upon instalments payable at call, yet if a municipal corporation is afterwards authorized to subscribe for the stock of the company by a loan of its credit, the railroad company thereby becomes authorized to receive the loan, and the act allowing the subscription, works a modification of the railroad charter to that extent. (Per COLE, J.) *id.*

6. A statute, authorizing a municipal corporation to issue bonds, &c., is a public law; and a purchaser of such bonds is bound to see that the authority to issue them existed; but though the exercise of the power is made to depend upon an election, he is not bound to inquire into the regularityof the election. He may presume that the preliminary steps have been taken according to law; nor is he bound to inquire into the existence and regularity of those steps. *id.*

7. The rule that parties dealing with officers of corporations are bound to know that they have authority to act, though proper for the protection of those whom the officers represent, is not to be carried so far as to destroy the safety and rights of those who with good faith and due diligence deal with the corporation. *id.*

8. Where the act, in pursuance of which bonds are issued by a city, is a public statute, the person dealing in them is chargeable with knowledge of the existence of the act. If it appears that the act has not been published, and is not in force, the authority to issue the bonds does not exist. *id.*

9. Where the law clothes an officer with discretionary powers, he must exercise the power upon his own responsibility; but the duty of interpreting the constitution and laws devolve on the court and not on the officer. *State ex rel. Carpenter vs Hastings.* 518

10. If an officer act without authority, it is the duty of the court to declare the action illegal; and it is not bound by the interpretation which the officer may have given to the law. *id.*

See EVIDENCE, 5.

STATUTE, REPEAL OF.

1. Chapter 220, Laws of 1859, which repealed the act of 1858, chapter 113, did not abate suits commenced and pending under it at the time of the repeal, nor affect them, except as to the time when the defendants were to be considered in default, and the time in which lands should be advertised for sale. *Beebe vs. O'Brien et al.* 481

2. This case is to be distinguished from the repeal of a statute creating a cause of action, or remedy, or conferring jurisdiction where it did not before exist. *id.*

3 The act of 1858 provided only for the mode of conducting proceedings in foreclosure actions, after they had been commenced in the manner there directed; otherwise, the proceedings were all conducted under and by the code of procedure; and the repeal of the act did not affect the provisions of the code in relation to the actions pending at the time of the repeal. *id.*

4. Where a party had commenced a foreclosure of a mortgage under a statute which required the defendant to answer in six months, and before that time expired, and after the defendants had entered their appearance in the cause, the statute was repealed, thus leaving no statute or rule of court prescribing the time in which the answer should be put in; such repeal does not abate the suit, but the plaintiff may serve a notice on the defendants to show cause, and on their neglect to answer, or show cause, judgment will be entered by the court as for a default. *Cornell vs. Skinner et al.* 489

See MORTGAGES, 10, 11, 12.
REPEAL OF STATUTE, 1.

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STREETS.

See TAXES, 4, 5, 6, 11, 13.

SUMMONS.

1. Where a party seeks to bring a defendant into court upon publication of summons under the code, he must strictly comply with the requirements of the statute, and unless this be done, the judgment will be reversed for want of jurisdiction of the person of the defendant. *Heffern vs. Davis.* 501

2. Statements on information and belief merely, that the defendant's residence cannot be ascertained, or that his whereabouts cannot be discovered, are not sufficient evidence of non-residence in the state to authorize an order of publication of the summons. Such statements are but hearsay, and do not amount to legal proof. *id.*

See JUDGMENT, 7, 8.

SUPPLEMENTAL PROCEEDINGS.

Proceedings supplemental to the execution established by the code, are a substitute for an action by creditor's bill, and constitute the only manner of obtaining the relief formerly had under a creditor's bill. *Graham et al. vs. La Crosse & Mil. R. R. Co. et al.* 459

SURETIES.

See REPLEVIN, 3, 4, 5.

SWAMP LANDS.

See PRE-EMPTION, 1.

T

TAXES.

1. Where the city of Milwaukee levied special taxes upon the lots of W. for the purpose of building streets and sidewalks in front of the same: *Held*, that these assessments could be sustained, on the ground that it was an exercise of the taxing power of the state and city, and was not a taking of private property for public use. *Weeks vs. City of Milwaukee.* 242

2. The constitutional provision, that "the rule of taxation shall be uniform," extends to all taxation by cities, towns and counties, in their exercise of the taxing power delegated to them by the state. The object of this provision was to protect the citizen against unequal and consequently unjust taxation. *id.*

3. "The uniform rule of taxation" provided for by Art. VIII., § 1, is applicable to municipal corporations, notwithstanding the provision of Art. XI., § 3, requiring the legislature in establishing them to restrict their powers of taxation, so as to prevent abuses, &c. This last provision was designed to furnish a further protection. *id.*

4. Assessments of special taxes upon lots for the purpose of constructing streets and sidewalks in front of such lots cannot be upheld by the constitution of Wisconsin, under the rule of uniformity of taxation alone; but it can be, under the provision requiring the legislature to restrict the power of municipal corporations in making assessments. *id.*

5. The word "assessment," as used in Art. XI., § 3, of the constitution of the state of Wisconsin, has reference to the system of special taxation for municipal improvements existing at the adoption of the constitution, and is a clear recognition of the existence of the power to make the special tax. *id.*

6. The provision of Art. XI., § 3, recognizes the power of special assessments in municipal corporations, and is so far a modification of the rule of uniformity, in Art. VIII., § 1, as the system of assessment is a departure from that rule; and, thereby, every lot may be compelled to build the street in front thereof, with such exceptions as the law may provide. The only remedy for abuses under this rule, is such restrictions as the wisdom of the legislature may impose on the exercise of the power. *id.*

7. Where, by an act of the legislature, the farming lands of W. had been annexed to the city of Milwaukee, and afterwards taxed at the same rate as other city property to pay the debts of the city: *Held*, that the act was constitutional, and the taxation was legal. *id.*

8. Where the assessors of the city of Milwaukee, in obedience to an ordinance of the common council, omitted to assess

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property to the value of $150,000, which ought to have been assessed, and that property was thereby exempted from taxation: Held, that such omission vitiated the whole tax. *id.*

9. Omissions to make assessments arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws, is intrusted, do not necessarily vitiate the whole tax; but an intentional disregard of those laws, in such a manner as to impose illegal taxes on those who are taxed, does. *id.*

10. The provision of the taxing laws, that where there has been an omission to tax property, it may be taxed the proper amount the next year, refers to such omissions as are constantly liable to happen, and does not invalidate the whole tax; but where the omission originated in an intentional departure from the law on the part of all the authorities, it renders the tax illegal, and it cannot be cured by that provision in the taxing laws. *id.*

11. Where the city of Milwaukee had taxed the lots of W. to abate a nuisance created by the act of the city, in the construction of streets, so as thereby to cause the water to stand upon the lots: Held, that the city has not the power to levy a special tax on the same lots to pay for filling them up so as to prevent the water from standing there; and such tax, if levied, is illegal. *id.*

12. Where the taxes on the lands of W. have been illegally increased by reason of the illegal exemption of other lands from taxation, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax. *id.*

13. Where a tax has been illegally assessed on the lands of W. for the purpose of abating a nuisance created by the taxing power on the same lands, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax. *id.*

14. Where the charter of the city of Racine provided, among other things, that the city council should have power to make piers, breakwaters, &c., for securing the lake shore within the city limits, to let the contract for their building to the lowest bidders, to levy a tax to pay for the same upon the wards or lots, which a jury of six, selected by the council, should determine, according to the benefit received: Held, that such proceeding was not a jury trial, but a special proceeding in the nature of a commission for a public purpose; and the voice of a majority would prevail in making the assessment. *Soens et al vs. City of Racine.* 271

15. The charter of the city of Racine provided that the council should not levy a tax to exceed $5,000 a year for current expenses, without a petition signed by fifty tax payers; nor without a vote of the tax payers, before making the levy: Held, that this provision did not apply to an assessment to make piers and breakwaters to protect the lake shore of the city. *id.*

16. Assessments upon certain lots for the purpose of constructing piers, &c., is not an appropriation of private property for public use, &c., it is merely the exercise of the taxing power for the public benefit. *id.*

17. The legislature are not authorised to levy a tax for merely private or individual ends. The authority delegated to the legislature, and by them transferred to the municipal corporation, is to be exercised only for some object of public or common interest. *id.*

18. Though private property may be directly or indirectly protected, or private interests promoted by a given improvement, it furnishes no rule for deciding that the improvement is not public. *id.*

19. To determine whether a matter is of public or merely private concern, it is necessary to consider, not whether the interest of some individual will be promoted; but whether the whole, or the greater part of the community will be so. *id.*

20. The charter of the city of Milwaukee, which provides for assessing a special tax upon lots in the city to pay the expense of opening, grading, improving and paving the streets, and building sidewalks and cross walks in front of the same lots, is constitutional. *Lumsden vs. Cross.* 282

21. All taxes levied for the purpose of revenue, and for the support of the government, as well for the expenses of municipal corporations as for the state at large, must be levied in accordance with the uniform rule prescribed by Sec. 1, Art. VIII, of the Constitution.

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22. Taxes raised by the city of Milwaukee to pay the expense of opening, grading, paving, and improving the streets, and constructing suitable sidewalks and cross-walks, can, under the provisions of Sec. 3, Art. XI, be assessed upon the lots in front of which the improvements are made, and not on the city at large. *id.*

See EVIDENCE, 5:
TITLE, FAILURE OF, 1.

TITLE, FAILURE OF.

Where a party contracted for the purchase of real estate, and paid part of the purchase money; and brought his action to recover back the money paid, because the vendor had not title to the land sold: Held, that it was error in the court below to refuse to allow the defendant to give in evidence the tax deeds for the same land, made to himself, for the purpose of showing title in himself. *Falkner vs. Guild.* 563

TREASURER OF STATE.

See SECRETARY OF STATE, 1, 2, 3, 4, 5, 6, 7.

TRESPASS.

1. An answer to a complaint *de bonis*, which justifies under a writ of attachment, without avering an indebtedness on which the writ issued, is not sufficient to authorise the defendant to attack the title of the plaintiff by showing that the sale to the plaintiff was fraudulent and void as against creditors, *Norton vs. Kearney et al.* 443

2. In an action of trespass against several defendants, it is erroneous to instruct the jury that an appraisal, made by one of the defendants, of the goods taken, was conclusive of their value as to all the defendants. *id.*

See CAPIAS, 1, 2, 3, 4.
EJECTMENT, 1, 2, 3.

TRIAL.

See CREDITOR'S BILL, 1.

TRUSTS.

See PARTITION, 2, 3, 4, 5, 6, 7.

U

USURY.

1. Where S. had overdrawn his account with a bank, and then made a note to the bank putting into it the amount of interest then due at 10 per cent., and making the note draw interest at 12 per cent. when due: Held, that such contract was not void by reason of the banking law of Wisconsin, which authorized the bank to receive a rate of interest not exceeding 10 per cent. *Rock River Bank vs. Sherwood.* 230

2. The banking law of Wisconsin provides no penalty or forfeiture in case a bank takes more than 10 per cent. interest. *id.*

3. There being no penalty provided in the general banking law for a violation of the same by a bank in taking more than 10 per cent. interest, the general law relating to usury applies to, and has the same effect upon a contract made in violation of the charter by the bank, as upon a contract made by an individual. *id.*

4. When a bank reserves a greater rate of interest than its charter allows, the general usury laws apply to the contract, although it does not exceed the rate prescribed by such usury law; and the general law is modified by a restriction in the bank charter, to the extent of the restriction. *id.*

5. Under the first section of the usury statute of 1856, the security was valid for the repayment of the principal sum loaned, but void for the interest reserved. *id.*

6. A pleading which avers that a bank had no authority to take a note which reserves a greater rate of interest than the bank is authorized to take, does not raise the question of usury, but of capacity in the bank to make the contract. *id.*

7. The interest on a usurious contract may be recovered, unless the defendant by his pleadings set up the usury as a defense, and apply to the court for the relief given by the usury act, and make and prove the tender of the principal as required by the statute. *id*

8. In pleading usury the rule is well settled, that the facts must be set forth

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with certainty, so that the court can see that they amount to usury, and what was the amount of the usurious interest. *Newman vs. Kershaw.* 333

9. A defect in stating the facts of usury, should, as a general thing, under the code, be reached by a motion to make the pleading more definite; and not by a demurrer to the plea. *id.*

10. The rule in regard to pleading usury is so strict, that defects in regard to certainty are to be held matters of substance; and no evidence can be given under a pleading containing only general allegations of usury. *id.*

11. There is no doubt of the power and duty of courts to allow amendments to pleadings in furtherance of justice, and upon such terms as may be proper; and under this power of the court, a defense of usury may be amended. But whether in such case it might not be "a furtherance of justice" to require the party to pay the principal sum loaned, as a condition of amendment. Quere? *id.*

12. Under the general rule that contracts are to be governed by the law of the place of performance, it is held that a contract for the payment of money, made in one state, where the interest reserved would be illegal, is still valid, if it is payable in another state, where the interest is legal, there being no intent to evade the laws of the state where the contract was made; so contracts have been held illegal, although valid by the law of the state where made, if payable in a state where they would be void for usury. *id.*

13. A contract made in a state where it is valid, but which is to be performed in another, where it would be invalid, must depend for its validity on the decision of the question of the laws of which of these states shall govern the contract, and this should be determined by the intention of the parties, gathered from the whole transaction, rather than from the fact in which of the states the security for the performance of the contract shall lie; though the location may have an influence in determining what that intention actually is. *id.*

14. The place of payment may, in the absence of any more controlling circumstances, be sufficient to show that the parties intended to refer the contract to the law of that place; but if the loan was actually made in another state, the money to be used, the parties residing, and the security given there, and if by the law of that state, the contract would be valid, but invalid by the law of the place of payment, these facts may well be held to have a stronger influence in showing the intention, than the mere place of payment; and where the intention is rebutted, the rule should cease. *id.*

15. The mere writing, by which the repayment of a loan is secured, does not always evidence the whole of a contract, or transaction between the parties, and therefore does not disclose the entire place of performance, or whether the contract be valid or not; thus on a contract to loan, the lender performs his part in one state, and the place of payment is in another, the place of the performance being partly in one state and partly in another, then the laws of the first state would be applicable, and the contract be held valid; whereas, if the loan were made in the latter state, the money used and to be repaid there with usurious interest, it would be invalid. *id.*

16. A subsequent purchaser of real property is entitled to avoid a prior incumbrance, by mortgage, on the ground of usury in the making thereof; as where the defendant to an action to foreclose a mortgage, as subsequent purchaser set forth that he purchased the property with the information from the grantor of the usurious character of the prior mortgage, and relied on being able to avoid it for that reason; that he had also given the grantor a mortgage for a part of the consideration money: Held, that he might make that defense. *id.*

17. Upon a defense of usury, it is not necessary to allege a tender of the principal loaned in the pleading, before the party should have the benefit of the plea, nor was the want of such an allegation a ground of demurrer. *id.*

18. The provision of the statute of Wisconsin, requiring the party who relies upon the defense of usury to avoid the payment of interest, to prove that he had tendered the principal sum loaned, before he shall receive any advantage of such defense, was designed only to regulate the effect and validity of contracts made under it, and not of those made under the laws of another state; thus they are not applicable to a contract made in the state of New York. and to which the laws of that state apply. *id.*

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19. The *lex fori*, which applies to the remedy upon contracts, is not to be extended so as to make a contract void for usury in one state valid in another, where it is sought to be enforced upon the security. *id.*

20. If a defendant in an action to foreclose a mortgage on land in this state, sets up a good defense of usury under the laws of New York, and is able to sustain it without the affirmative aid of a court of equity, there being no law requiring him to pay the principal, he is not bound to make an offer to pay before he can have the benefit of the defense. *id.*

21. Whether a party can be examined for the purpose of eliciting facts to enable the opposite party to plead usury; and whether if he can, an application for such an examination, is such a resort for affirmative relief to a court of equity, as under the law, as it now exists, of authority to examine parties as witnesses, requires the payment of the principal sum loaned. Quere. *id.*

See BANKS, 2, 3.
FRIVOLOUSNESS, 2.
INTEREST, 3, 4.

V

VENDOR AND VENDEE.

Where M. entered into a contract with D. to make a deed of certain land within one year; and on the third day after the year expired, he made such deed and delivered it to D.: Held, that M. was not in default for not making the deed before that day. A vendor of real estate, who has covenanted to convey by a day certain, is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and waited a reasonable time. *Dye vs. Montague.* 18

VENUE.

See JUDGMENT, 1, 2.

VERDICT.

See PLEADING, 6.

W

WARRANT OF ATTORNEY.

1. Where a party has a negotiable promissory note and warrant of attorney on which he enters judgment, and describes himself as the assignee of the payees, such description may be regarded as merely *descriptio personæ*, and does not vitiate the declaration. *Blakie vs. Griswold.* 293

2. A party having a promissory note and warrant of attorney, may file a declaration in common counts, with a copy of the note, and such declaration will be treated as a complaint under the code. *id.*

3. An affidavit made by the attorney of the party, which states that he is the attorney, &c., and also the amount actually due on the note upon which he is entering judgment by cognovit, is sufficient to sustain the judgment; without stating that he makes the affidavit on behalf of the plaintiff in the action. *id.*

4. Where a judgment is entered upon a warrant of attorney for a less sum than is actually due, the defendant cannot assign that cause as error in the judgment. *id.*

5. A judgment by cognovit may be entered in the circuit court without leave of the court, within a year of the date of the warrant of attorney, in vacation. And the record of the judgment may be signed by a court commissioner. *id.*

6. Courts have a general discretionary control over judgments entered upon a warrant of attorney, and can protect the defendant from any imposition or fraud which may intervene. *id.*

See COGNOVIT, 1.

WATER COURSE.

1. Where the outlet of a lake is obstructed by natural causes, so as to raise the waters in the lake, and cover the lands of an adjacent owner, he is not at liberty to drain off the waters by some other chan-

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nel, conveying them in another direction from their natural outlet; but his efforts must be directed to the removal of the obstruction which caused the back water, leaving the owners along the stream in the legal enjoyment of the natural flow of the waters. *Mohr et al. vs. Gault.* 563

2. The obstruction of a running stream occasioned by the washing down of its banks, does not in law constitute a nuisance, unless such obstruction is attributable to the acts or agency of man. *id.*

WRIT.

An order for arrest of the defendant in a suit, is a *writ* or *process* within the constitution, and should run in the name of "the state of Wisconsin;" but such style is matter of form, and may be amended on motion. *Ilsley vs. Harris.* 95

See ASSISTANCE, WRIT OF, 1.
CAPIAS, 1, 2, 3, 4.
EJECTMENT, 1, 2, 3.
JUDGMENT, 7, 8.

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